



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

DIVORCE CAUSE 230 OF 2013

D.C.M. PETITIONER

VERSUS

J.W.C.....RESPONDENT

J.W.C.....INTERESTED PARTY

RULING

By an application filed by the Interested party /Applicant on 6th February, 2015 brought under **Section 1 1A 1B & 63 of the CPA; Order 40 Rule 6&7; Order 51 Rule 1 CPR 2010; Section 17(1), (2), (b), (c) of Matrimonial Property Act, 2013**, sought the following orders;

- a. Pending the hearing and determination of this Application, a temporary injunction to issue restraining the Respondent J W C by herself, invitees, servants, agents, licensees and/or tenants or otherwise howsoever from trespassing upon, remaining upon, occupying, leasing, charging, licensing, letting, constructing upon, uttering title [*particulars withheld*], Githuri Road, Nairobi County, claiming or asserting to be proprietor thereof, or otherwise howsoever dealing in the Parcel of land [*particulars withheld*], Githuri Road, Nairobi County;
- b. A temporary injunction to issue restraining the Respondent J W C by herself, invitees, servants, agents, licensees and/or tenants or otherwise howsoever from trespassing upon, remaining upon, occupying, leasing, charging, licensing, letting, constructing upon, uttering title [*particulars withheld*], Githuri Road, Nairobi County, claiming or asserting to be proprietor thereof, or otherwise howsoever dealing in the Parcel of land [*particulars withheld*], Githuri Road, Nairobi County until the hearing and determination of the Divorce Cause (s).

This Application is based on the following grounds;

The Applicant through learned Counsel Mr. Maina stated as follows;

This Court's Ruling of 7th November, 2014 in which the Applicant, who is the ex-wife to the Petitioner in Divorce Cause 230 of 2013 (present proceedings in the instant Court File) sought and was granted orders to join her as an interested party to the present divorce proceedings to the extent of the hearing and determination of ownership and possession of the suit property L.R. 209/3413.

The Applicant confirmed from the Affidavit filed on 27th February 2014 that she was married to the

Petitioner for 41 years; they had 6 children of the marriage. They started from humble beginnings and in 1976 bought the suit property. While the Petitioner was abroad on scholarship, he gave the Applicant power of attorney to conduct business on his behalf; among the transactions was purchase of the suit property.

The Applicant started working as a nurse and later she was involved in the matatu business jointly with the Petitioner. They bought the following properties; Suit property *[particulars withheld]*, land parcel; *[particulars withheld]* and established a tea plantation and land parcel *[particulars withheld]*.

The Applicant contributed to the purchase of the suit property *[particulars withheld]*. She paid the loan of Ksh 23,000/= from Kenya Commercial Finance. She sold her shop in Kariobangi for Ksh 40,000/= which she paid towards purchase of the suit property. From 1991-1996 they developed the suit property that contains 6 bungalows for rent receivables.

The Applicant and Petitioner divorced in 2010 vide Thika **Chief Magistrate's Court; Divorce Cause 540 of 2010**. The same year, the Petitioner married the Respondent; J W C and they resided in the suit property.

The Applicant claimed that following divorce she did not pursue the division of matrimonial property. The suit property was bought in 1976. The Respondent was married in 2010 and moved into the suit property in 2010. In spite of the Court Ruling of 8th May 2014, the Respondent has no legal right or claim over the suit property.

The Applicant reiterated that the Respondent has her matrimonial home in Syokimau that she ought to relocate to the said home and vacate from the suit premises. The Applicant lays no claim to the said matrimonial home.

By the Petitioner's affidavit filed on 11th February 2014, he supported the Applicant's version of facts, that they were married during which time they jointly purchased the suit property.

The Applicant sought through Counsel that the suit property be vacated and handed over to 3rd parties and rented out and the rent receivables be deposited in a joint account and shared.

The Respondent through learned Counsel Ms. Wambugu stated as follows in opposing this application;

The Respondent stated, this cause is based on a divorce petition filed by the petitioner on 23rd October 2013 to dissolve marriage between himself and the Respondent.

The Applicant is an ex-wife and she divorced with the Petitioner in 2010.

The Respondent stated, the Applicant's application seeking to be joined as an interested party to these proceedings and the present application seek similar orders from the Court.

The Respondent was of the view that the issue regarding the suit property ought to await the hearing and determination of the present Cause and **Judicial Separation 213 of 2013** before the division of matrimonial property sets in.

The Respondent referred the Court to the orders of this Court; by Hon. Justice L. Kimaru vide the Ruling of 8th May 2014. The Petitioner sought the Respondent's eviction from the suit property *[particulars withheld]* Githuri Road High ridge, Nairobi that is also *[particulars withheld]*. The Petitioner alleged nuisance by the Respondent to tenants The Court delivered the ruling pursuant to this application and ordered that the Respondent resides in the suit premises until hearing and determination of the Judicial separation by the Respondent and Divorce Cause by the Petitioner. Therefore, the Respondent claims that these are valid and a regular order of this Court which no review or appeal has been preferred. To allow the present application would be in violation of legal order of the Court.

Further, the Respondent alluded to the fact that the present application raised issues already determined and are *res judicata*. Bringing a new application is an abuse of the Court process and the Application ought to be dismissed.

The Respondent asserted that issue in Court is one of dissolution of marriage and judicial separation between the Petitioner and Respondent. The issue regarding matrimonial property shall be ventilated in full at the appropriate time and not now in the present application. The Application has no merits.

The Court has taken into consideration the pleadings filed by parties and submissions made through Counsel. The Court makes the following observations;

1. There is on record the Ruling of 8th May, 2014 whose main thrust was to maintain status quo of the Petitioner and Respondent as regards the suit property pending hearing and determination of the pending divorce and Judicial Separation Causes. Therefore, the parties did not apply for review of these orders or lodge an appeal, the vacation or otherwise of the Respondent from the suit premises shall be determined once the 2 Causes are dispensed with through a hearing.
2. Whereas the orders of 8th May, 2014 are valid, they relate and apply only to the Petitioner and the Respondent only. The orders do not affect or curtail the interested party's right to apply to be joined to these proceedings to the extent only with regard to her interest in the suit property. The interested party was not part of the proceedings at the time the Ruling was delivered and the Court at the time was not privy to the Applicant's claim. Now that she made her claim to the suit property as property she contributed to its purchase and was their matrimonial home until they divorced in 2010, she ought to have an opportunity to prove her claim thus joined as interested party by the Court's Ruling of 7th November 2014.
3. Similarly, the issue regarding the suit property [*particulars withheld*] Githuri Road High ridge, Nairobi that is also [*particulars withheld*] is not *res judicata*. **Section 7 of the Civil Procedure Act** confirms what constitutes as *res judicata*;

“it is any suit or issue ...in which the matter directly or substantially in issuebetween the same parties has been heard and finally decided by the Court”

The issues of ownership or possession of the suit property are not finally decided. The Court's Ruling of 8th May, 2014 was to the effect that the Respondent remains in the home until the divorce cause and judicial separation cause(s) are heard and determined. The parties to the Application that culminated to the Ruling of 8th May, 2014 are not the same as in the instant application; the interested party is now joined to these proceedings.

4. The Petitioner's petition filed on 24th October, 2013 seeks among other orders;

“That by permanent injunction, the Respondent by herself, her servants, her agents otherwise howsoever, be restrained from interfering with, occupying or otherwise trespassing upon the Petitioner's property known as [*particulars withheld*] Githuri Road High Ridge situate in Nairobi County.”

5. The Respondent's Chamber summons application filed on 22nd November, 2013, she sought the following orders among other orders;

“That this Honorable Court do grant a permanent injunction restraining the Respondent (Petitioner) from residing in the matrimonial home at Highridge.

That a mandatory injunction do issue directed to the Petitioner allowing her to collect rents from the Highridge properties for her sustenance and that of the minor.”

6. I both pleadings although the issue that is germane is divorce or judicial separation between the Petitioner and Respondent, clearly there is closely related issue also for determination the issue of ownership and possession of the suit property. Although these are divorce proceedings and the Applicant ought to wait for the division of matrimonial property proceedings, the truth is from the pleadings the issue of the suit property is intertwined in the present proceedings. Hence the Applicant ought to remain joined to these proceedings for an opportunity to establish and prove her claim over the suit property as the petitioner and Respondent canvass the same issue with regard to the Property.
7. From these observations, the Applicant's application of 6th February, 2015 is granted in the following terms;

FINAL ORDERS

1. **Divorce Cause 230 of 2013 and Judicial Separation 219 of 2013 are consolidated and to be heard *interpartes* through *vivavoce* evidence on a hearing date obtained by the parties.**
2. **Thika Chief Magistrates' Court Divorce Cause 540 of 2010 be retrieved and brought to this Court to confirm that the Applicant did not pursue matrimonial property after divorce.**
3. **During the hearing, when in relation to the suit property [*particulars withheld*] Githuri Road High Ridge situate in Nairobi County, the Applicant to participate and also establish her claim over the property for determination by the Court.**
4. **In the meantime, the Respondent is resident in the suit property by order of the court of 8th May, 2015 A temporary injunction issues restraining the Respondent J W C by herself, invitees, servants, agents, licensees and/or tenants or otherwise howsoever from leasing, charging, licensing, letting, constructing upon, uttering title [*particulars withheld*], Githuri Road, Nairobi County, claiming or asserting to be proprietor thereof, or otherwise howsoever dealing in the Parcel of land [*particulars withheld*], Githuri Road, Nairobi County until the hearing and determination of the Divorce Cause (s).**
5. **Any aggrieved party may apply**
6. **Each party shall bear their own costs.**

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

M. W. MUIGAI

JUDGE

In the presence of;

Mr. Kariuki holding brief for Ms. Wambugu.