

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO.230 OF 2013

D C M.....PETITIONER

VERSUS

J W C.....RESPONDENT

R U L I N G

The Petitioner and the Respondent, both then divorcees, were married on 25th September 2010. The marriage was celebrated under the **Marriage Act**. It appears that the marriage has not been a happy one. The Petitioner has petitioned this court to be divorced from the Respondent on the grounds of adultery and cruelty. On her part, the Respondent has filed a Judicial **Separation Cause No.219 of 2013** which is pending hearing before court. The Respondent alleges that the Petitioner has committed the matrimonial offences of cruelty, desertion and willful neglect. There is a pending application by one J W C who seeks to be enjoined to these proceedings for the purpose of division of matrimonial property which are registered in the name of the Petitioner. The application is predicated on the provisions of **Section 17** of the **Matrimonial Property Act**.

Pending the hearing of the divorce, the Petitioner moved this court by notice of motion made pursuant to **Sections 1, 1A, 1B, 3, 3A, 63(c) & (e)** of the **Civil Procedure Act** and **Order 40 Rules 1(a), 2(a) & 10(b)** of the **Civil Procedure Rules** seeking orders of this court to restrain the Respondent either by herself or by her agents from inviting strangers of the Akorino sect who allegedly are loudly and uncontrollably demonstrating, playing their songs, trespassing, remaining upon, occupying or act as licencees, or carrying on any forms of rituals, or otherwise dealing with the Petitioner's property known as LR. No. **[Particulars withheld]** Githuri Road, Highridge Nairobi pending the hearing and determination of the divorce cause. The Petitioner further prayed that the Respondent be compelled to move to the Syokimau property which is her matrimonial property where she is at liberty to conduct her Akorino sect religious freedoms. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the Petitioner, D M K and P A L. The application is opposed. The Respondent swore two affidavits in opposition to the application.

At the hearing of the application, this court heard oral rival submission made by Mr. Kinyanjui for the Petitioner and by Mrs. Wambugu for the Respondent. This court has carefully considered the said submission. It has also read the pleadings filed by the parties herein in support of their respective opposing positions. The facts of this application are more or less not in dispute. As stated earlier in this Ruling, the Petitioner and the Respondent are estranged. There are pending proceedings before this court for the dissolution of the marriage. The Respondent resides in one of the houses situate on the property registered as LR. No. **[particulars withheld]** Githuri Road, Highridge Nairobi. It is apparent that the Petitioner wants the Respondent out of that property. On the other hand, the Respondent wants to stay put pending the hearing and determination of the separation and divorce causes. That appears to be the bone of contention between the Petitioner and the Respondent. The Petitioner alleges that the Respondent has brought members of the Akorino Sect to the suit property, who by the nature of their religious practice, have caused nuisance to the tenants within the premises. The nature of the nuisance is loud noise. The Petitioner suspects one of the male members of the Akorino sect is having a relationship with the Respondent. The Respondent does not deny that she invited members of the Akorino sect to conduct

prayer sessions in her house. She is of the view that that is her constitutional right. She deponed that the Petitioner cannot prevent her from exercising her freedom of conscience as guaranteed by the constitution. She further raises other issues related to what she perceived to be the real dispute between herself and the Petitioner. It is her case that the Petitioner is essentially using the alleged nuisance to have her removed from the matrimonial home before the hearing and determination of the separation and divorce proceedings. She denied the assertion by the Petitioner which is to the effect that her matrimonial home is at Syokimau.

Upon evaluation of the facts of this case, it was clear to this court that the issues that are sought to be canvassed in this application cannot be separated from the issues that are germane to the divorce case. It was apparent to this court that what is at play is the first spurs of a claim for matrimonial property. The Petitioner wants the Respondent out of the suit property because he is of the view that he had acquired that property long before he married the Respondent. On the other hand, the Respondent claims part of the suit property as her matrimonial home. That issue will be determined at the appropriate time. The issue for determination at this stage of the proceedings is whether the Petitioner established a case for the removal of the Respondent from the suit property. This court is of the view that the Petitioner did not establish a suitable cause for intervention by this court. The Respondent has a right which is constitutionally guaranteed to exercise her religious freedom in her house. If she is creating a nuisance as the Petitioner claims, there are other ways in which the Respondent can be compelled to abate the nuisance. However, it does not include the Respondent being removed from the premises that she considers as her matrimonial home. As stated earlier in this Ruling, this application, considered in the context of matrimonial property dispute, is actually the first salvo in the bruising fight that is anticipated to take place. The Petitioner is however counselled to hold his horses until the appropriate time. The Petitioner has not placed any grounds before this court that would persuade it to exercise its discretion in favour of the Petitioner and grant the prayers sought in the application.

In the premises therefore, the Petitioner's application dated 7th April 2014 lacks merit and is hereby dismissed but with no orders as to costs. The parties herein are urged to take appropriate steps to make the proceedings in the two cases ready for hearing so that the real issues in dispute can be heard and determined as soon as possible. The more the parties engage in what this court considers as side issues, the more they will cause distress to themselves. It is so ordered.

DATE AT NAIROBI THIS 8TH DAY OF MAY, 2014.

L. KIMARU

JUDGE