



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SEPARATION CAUSE NO. 9 OF 2014

S N K.....PETITIONER

VERSUS

S H.....RESPONDENT

RULING

Before court is the Notice of Motion dated 6-2-2014 by which the Petitioner **S N K** seeks inter alia the following orders

“4 **THAT** the Honourable Court be pleased to restrain the Respondent by himself, his agents, employees and assigns from dealing with all that property known as **Plot No. [particulars withheld]/I/MN**

or in any manner whatsoever interfere with the Petitioner’s/Applicant’s right of access, occupation and right of guest enjoyment of the same pending the hearing and determination of this Cause”

On 11/2/2014 the High Court in Mombasa granted temporary orders in terms of prayer (2) of the Notice of Motion. The application was opposed by way of a Replying Affidavit dated

25-2-2014 sworn by the Respondent **S H**. The application was disposed of by way of oral submissions. **MR. WAMEYO ADVOCATE** acted for the Petitioner whilst **MS NGIGE ADVOCATE** appeared for the Respondent.

The background of the case is that the Petitioner and the Respondent got married to each other on 29th December 2011 under the provisions of the Marriage Act Cap 150 Laws of Kenya. After the marriage the Petitioner lived in Kenya where she continued to do business. The Respondent a Swiss national would commute between Kenya and Switzerland. Following claims of adultery on the part of the Respondent the Petitioner on 7-2-2014 filed a Petition seeking the following orders;-

- “a) That a decree of separation to issue
- b) That the Petitioner be allowed to access her house .
- c) That the costs of the Petition be to the Petitioner

The bone of contention between the couple is the property known as **Plot No. [particulars withheld]/I/MN** in Bamburi which the Petitioner claims as the sole proprietor having purchased the land

in 2008. The Respondent on the other hand alleges that he availed the funds for the purchase of the Suit Property and further alleges that the Petitioner did on 29/1/2014 transfer the same to him. The current position is that the Petitioner is not in occupation of the Suit Property. The same is currently occupied by one “**F M M**” with the authority of the Respondent. The Petitioner has now come before this court seeking an injunction to restrain the Respondent from transferring or in any manner whatsoever dealing with the Suit Property until this case is heard and determined.

It is clear that the question here revolves around the ownership or title to the Suit Property. Although the Respondent claims that the same was transferred to himself, the Petitioner disputes this and has made allegations of illegality and fraud in said transfer. The Petitioner maintains that the house belongs to her. Ordinarily questions regarding validity of Title to land would be determined by the Environment and Land Court. The question that would arise is whether this court sitting as a Family Court has requisite jurisdiction to pronounce on this question. As stated earlier the two parties herein are a married couple. Section 17 of the Matrimonial Property Act 2013 provides that

“17(1) A person may apply to court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.

(2) An application under subsection (1) –

a) Shall be made in accordance with such procedure as

may be prescribed.

b) May be made as part of a petition in a

matrimonial cause and

c) May be made notwithstanding that a petition has not

been filed under any law relating a matrimonial

causes (own emphasis)”

Before this court the Petitioner is clearly seeking declaration of rights to a property which is contested between the spouses. The Petitioner has made a prayers seeking to be granted ‘access’ to the Suit Property. Therefore this court will be required to make a determination as to whether she is entitled to the access prayed for. This will entail making a declaration of her right (if any) to the Suit Property under Section 17. As such I find that this court does have powers to determine the assertion of the right of each spouse over the Suit Property in these proceedings.

In order to preserve the subject matter of the Suit being **Plot No. [particulars withheld]/I/MN**, it is necessary to make such orders as are necessary to prevent the respondent dealing with the Suit Property in any way that would be prejudicial to the Petitioner’s interest and to make such orders as to ensure that the Petitioner’s prayer for access if eventually granted will not be rendered nugatory. I therefore direct that the present status quo with respect to the Suit Property be maintained pending the hearing and determination of this Cause. For clarity, I hereby order that

“The Respondent be and is hereby restrained by himself, his agents, employees and assigns from transferring, selling, charging, leasing or in any manner whatsoever dealing with all that property known as **Plot No. [particulars withheld]/I/MN** pending the hearing and determination of this Cause.

Costs in the cause.

Dated and Delivered in Mombasa this 13th day of October, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Obala h/b Ms. Nginge for Respondent

No appearance for the Petitioner

Court Clerk Mutisya

M. ODERO

JUDGE

13/10/2014