

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

DIVORCE CAUSE NO.109 OF 2011

P J K.....

.....PETITIONER

VERSUS

J K S.....RESPONDENT

RULING

On 1st November 2012, this court (Ogola J) granted the petition for divorce which had been sought by the Petitioner. The Petitioner was further granted custody of the children of the marriage. The Respondent was granted access to the children of the marriage upon agreement with the Petitioner or as may be directed by the court. The Respondent was restrained by means of mandatory injunction from interfering with ***“the petitioner at her home and elsewhere during her day to day activities”***. From affidavit evidence of both the Petitioner and the Respondent, it was apparent that the home that the court referred to in the judgment is on Plot No.12 on LR. No. ***[Particulars withheld]*** Embakasi (suit property). According to the Petitioner, the Respondent did not abide by the terms of the mandatory injunction issued by the court and had continued residing on the suit property. The Petitioner complained that the Respondent had even proceeded to assault her in the said house to an extent that she has sustained injuries and had been forced to seek medical attention.

The Petitioner therefore filed an application seeking to have the Respondent restrained from entering, remaining or interfering with the Petitioner’s occupation of the suit property. 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. The Petitioner filed a replying affidavit in opposition to the application. In the said affidavit, while conceding that he was residing on the suit property, he denied the allegation that he had assaulted the Petitioner. He averred that he was currently jobless and had no other residence in Nairobi. He was of the view that if the court allowed the application, it would render him destitute because he would have no place to reside. He urged the court to dismiss the application.

At the hearing of the application, this court heard oral rival submission made by Miss Odeo for the Petitioner and by Mr. Chelanga for the Respondent. This court has carefully considered the said arguments. It has also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the Petitioner made a case for this court to grant the orders that she craves for from this court. It is not in dispute that upon this court granting the petition for divorce, it restrained the Respondent from interfering with the Respondent at her home. It is the Respondent’s case that the court did not specify what ***“the home”*** was. On her part, the Petitioner is emphatic that the home that was referred to is the suit property. The Petitioner annexed a certificate issued by Primeland Holdings (K) Ltd which certified that she was the registered owner of Plot No. ***[Particulars withheld]*** on LR. No. ***[particulars withheld]*** Embakasi (the suit property). The Respondent disputes this fact. He holds that he financially contributed to the purchase of the suit property and therefore was entitled to reside on the same. The Respondent does not however dispute the fact that the suit property is registered in the name of the Petitioner. Prima facie, the property therefore belongs to the Petitioner unless contrary evidence is adduced. Interestingly, the Respondent did not annex any documentary evidence to his replying affidavit to support his contention that he had financially contributed to the purchase of the suit property.

What was clear from the evidence placed before this court is that a court of competent jurisdiction issued an order restraining the Respondent from interfering with the Petitioner's occupation of the suit property. This court did issue interim order on 3rd September 2013 restraining the Respondent from accessing the suit property pending the interpartes hearing of the application. It was apparent that the Respondent disobeyed this order. He continued residing in the suit property. Whereas the Respondent may have had a case to the effect that the order issued by this court on 1st November 2012 was vague as to the description of **"the home"**, the order issued by this court on 3rd September 2013 was specific. In both instances, the Respondent disobeyed the orders of this court. This clearly showed the attitude of the Respondent.

From the Respondent's submission, it was apparent that he was laying claim to the suit property. In this court's view, the present cause is not the right forum for the Respondent to lay such a claim. Such a claim will be considered in a matrimonial property case. What is before this court is the determination of the question of who is entitled to reside on the suit property pending the filing of such suit, if at all. As stated earlier in this ruling, the Petitioner established, prima facie, that she was the owner of the suit property. She is entitled to reside in the same. The Petitioner and the Respondent are divorced. The Respondent has no right to impose himself on a property that is owned by the Petitioner. This court will therefore grant the application sought by the Petitioner as a result of which the Respondent is restrained from interfering with the Petitioner's quiet occupation of the suit property. This court reiterates the orders issued earlier on 1st November 2012. The Respondent is ordered, by mandatory injunction, not to interfere with the Petitioner either at her home in the suit property or elsewhere. The Petitioner shall have the costs of the application. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2013

L. KIMARU

JUDGE