



REPUBLIC OF KENYA

DIVORCE CAUSE 119 OF 1999

HIGH COURT AT NAIROBI

DGN..... PETITIONER

VERSUS

ENN..... RESPONDENT

RULING

This is an application by DGN for orders that:1.....

2. Respondent be compelled by mandatory orders to allow the applicant back to the matrimonial home in Runda House NO, 213.

3. Respondent his agents or relatives be restrained by injunction from molesting harassing assaulting stalking or interfering with the applicant

4. Respondent, be compelled by mandatory orders to permit and allow applicant to continue with her work- at Select and Pay Supermarkets and other businesses (jointly owned) and to enjoy same rights and pays and allowances as was before the respondent forcibly evicted her.

5. Respondent be restrained from interfering with quiet and peaceful working condition of the petitioner at Select and pay super markets or any other business jointly owned or at any other place.

6. Petitioner is given custody of Sammy Wambugu.

7. Respondent is ordered to pay maintenance to the applicant for herself and minor child of the marriage.

The application was filed contemporaneously with the petition for Judicial Separation on the grounds of Respondents desertion and adultery.

The parties have been married since 1989. They have five children three over 18 years old, one aged 16 and the last born aged 14 years. They have lived in the Runda House since 1992. They ran businesses and have interest in four companies viz.:

(a) Select and Pay - a chain of supermarkets

(b) united Caterers

(c) Spurs Investments

(d) Elida Homes.

Petitioner avers that those companies are joint ventures and both are directors of those companies. The Respondent avers that there are other directors in "Select and pay" Supermarkets. The Runda House belongs to Select and Pay Supermarkets. Petitioner deposes, inter alia, that on 17.9.99 she was forced into a car by three men and respondent and driven to Nyeri (Couples rural home) leaving Respondent behind. At Nyeri, she was given a letter by respondent containing various allegations against her and barring her from returning to the matrimonial home and to any of the businesses. She deposes further, that, when she later returned to Nairobi she found locks of the Runda house had been changed and new security at the gate installed who barred her access to the home. She says that all her clothes, and medicine are locked inside the house and that she has been denied access to her place of work and, also denied use of motor vehicle Keg. No. KAK 807B

The Respondent deposes inter alia, that petitioner is a nominal share shareholder in the four companies which has other share holders and that she enjoys the facilities offered by virtue of being his wife and not as of right. He has made several serious accusations against the petitioner including stealing large sum of money (shs 3.5 million) from his companies; colluding with others to have *him* murdered; poisoning him resulting in his admission at Nairobi Hospital for several days; stealing his property documents; running some business secretly, that is, a fleet of matatus and retail business at Gikomba.

He deposes that the act of attempted murder by poisoning him spurred him to summon elders at home before the Chief and parents so that she could explain what her problem is. He denies all allegations and deposes that he is factually reasonably apprehensive that his life is in real danger of being terminated by the petitioners if given an opportunity.

It is apparent that most of the averments to support the interlocutory application are the same averments or facts which support the petition for Judicial Separation.

Those facts are disputed by respondent by affidavit evidence. The disputed facts cannot be decided on affidavit evidence and in any case an attempt to decide the disputed facts at this stage will not only prejudice the petition but also Divorce Cause NO. 49/99 pending in Chief Magistrates Court Millimani. In that cause, the respondent in this case is a Co-respondent. Petitioner avers in para 9 of the petition and deposes in para 8 of the supporting affidavit that respondent has been living with Hellen Muthoni

Thimba - the respondent in Divorce cause no. 49/99. It is apparent therefore, that the issue of Respondents abandoning the matrimonial home to live with Hellen Muthoni Thimba is sub-judice and court cannot even deal with it in the present application.

It is also apparent the application discloses two distinct types of dispute. One is a matrimonial and the other a business dispute. The dispute one the shareholding of the companies and the rights and privileges of the petitioner in those companies including the right to have a car and an office are business disputes.

Those disputes cannot be decided in a petition for Judicial Separation. The petitioner can pursue those disputes either through the company law or through the married women Property Act.

I conclude therefore the court does not have jurisdiction to entertain prayers nos 4 and 5 of the application in a petition for judicial separation.

Regarding the prayer for custody of the child and maintenance of the petitioner and the child appropriate evidence has not been placed before the court to enable the court to make a judicial determination. Indeed the court has not been addressed fully on the two prayers.

Firstly regarding the issue of maintenance, the needs of the applicant and the child are not known and have not been tabulated.

The means of the Respondents are not known. Alimony pending suit to a wife is by statute limited to no more than 1/5, of the husbands net annual income.' In the absence of the relevant evidence alimony pending suit is incapable of assessment.

Regarding the custody of the child, the child is 14 years and is in a boarding school. Both parents are the guardians of the child. The relevant evidence has not been placed before the court and in my case it is premature to deal with issue of custody of the child at this stage. I think the best cause is to leave the issue of custody and maintenance for determination later after the parties have brought relevant evidence to court.

That leaves only prayers nos 1 and 2 of the application. The first prayer is the most hotly contested. Miss Menje for petitioner contends that the house in Runda is registered in the name of United Caterers in which petitioner and Respondent are Co-directors and it is the matrimonial home. It is also her contention that a wife has a common law right over the Matrimonial home and cannot be unlawfully evicted and when evicted court has power to restore her into the matrimonial home and even ouster the husband from the matrimonial home. Respondent disputes that the Runda house is a matrimonial home, he deposes that he is living in the house as chairman of United Caterers - a company which owns the house.

Mr. Gathara for Respondent contends that a mandatory injunction is not appropriate in the circumstances of this case as the effect of it will be to force parties who cannot live together to start living together.

If the wife is saying that she is entitled to occupy the Runda House because she owns a share of the house by virtue of being a shareholder of United Caterers which owns the house, then that is a business or property dispute which I cannot determine in the present application. ;

But if she is saying that the house is the matrimonial home and is entitled to occupy it by virtue of being the wife of the respondent, which appears to be the case, then that is an issue which I can deal with in the present application. A matrimonial home does not have to be owned by the couple. The couple has been living in the Runda house as husband and wife and I will consider the Runda house as a matrimonial home for purposes of this application. Petitioner says that Respondent left the matrimonial home in November 1998 and went to live with another married woman. Respondent disputes that. I cannot decide that dispute on the basis of affidavit, evidence. Miss Mwenje submits that if the husband has now moved into the house the court should issue an ouster order. I will deal with the application on the premise that the husband is also in occupation of the matrimonial home.

The application is brought under sections 26 and 30 of matrimonial causes Act and Rule 3(2) of the matrimonial cause Act; and order 39 Rule 2 and 3 of Civil procedure Rules. The marriage of the parties is registered under the marriage Act and therefore matrimonial causes Act and Rules apply to this marriage.

Section 3 of the matrimonial causes Act gives the High Court jurisdiction and stipulates how the jurisdiction should be exercised. The Matrimonial causes Rules were made by the Rules committee pursuant to S. 39 of the matrimonial Causes Act.

The rules prescribes all matters of practice and procedure.

In my view, the court in matrimonial proceedings has only jurisdiction to give a relief which the Act prescribes. The relief's which court can grant in matrimonial proceedings are stipulated both in the matrimonial causes Act. and Rules. The Ancillary relief which court can give is defined in Rule 3(2) and does not include an order of injunction.

The order of injunction is sought under order 39 Rule 2 and 3 CP Rules. Order 39 Rules 2 relates to injunction to restrain breach of a contract. The matrimonial causes Act and Rules is a complete code governing matrimonial disputes. If the legislature intended to include an injunction as a remedy under the matrimonial causes Act. and Rules, it should have included that relief. I think there is no room for applying the Civil Procedure Rules in matrimonial proceedings. In any case, there is no breach of contract alleged which can be the basis of an order of injunction under Order 39 Rule 2 CP Rules. Furthermore, Miss Mwenge has cited cases to show that a mandatory injunction is issued under the courts inherent jurisdiction in section 3A of CP Act and not under Order 39 of CP Rules.

The Petitioner has not brought the application under S. 3A Civil procedure Act.

Secondly, although a mandatory injunction can be granted in a civil proceedings in appropriate cases, petitioners counsel has not referred to any local authority where an mandatory injunction has been granted in matrimonial proceedings to restore a wife into the matrimonial home.

However under English law a wife has a statutory right to occupy the matrimonial home and English courts have jurisdiction to exclude the husband from the matrimonial home. For instance the English matrimonial Homes Act, 1967 gives a spouse who is not entitled to the matrimonial home a statutory right of occupation. But that Act does not apply in Kenya See Elizabeth Wanjiku Mwangi versus Moses Kama'e Mwangi Civil Appeal No. 228 of 1998 (Unreported). Under the English Domestic Violence and matrimonial proceedings Act, 1967. the husband can be excluded from the matrimonial home see Myers v Myers (1982). ALL ER 776

Those statutes do not apply in Kenya. So there is no statute which gives court jurisdiction to grant prayers nos 2 in the application.

Assuming that the court had jurisdiction to grant the mandatory injunction sought, is it just and equitable to grant the mandatory injunction in the circumstances of this case?

The relationship between the parties is acrimonious. The husband is convinced whether rightly or wrongly that the wife had colluded with other people to kill him and has referred to several robbery incidents. He also believes that the wife poisoned him. He believes also that if his wife gets an opportunity he will kill him.

The wife accuses the husband of adultery and extreme cruelty, is it practicable that the two parties can live together under the same roof in the above circumstances? I do not think so. The court should not make orders in vain or which promotes breach of peace.

In any case, the prayer for mandatory injunction is inconsistent with the petition for Judicial Separation. By the petition, the petitioner wants an order that she no longer be bound to cohabit with the respondent. By the application for mandatory injunction she wants to go back to the matrimonial home.

The Petitioner has been described as a wealthy woman on her own right owning a fleet of matatus and business. If she cannot afford another suitable house, then, she should have applied for an order that the husband do provide a suitable house or a sum of money to meet her monthly rents and her other needs pending the determination of the petition. That would be the best alternative in the circumstances of the case.

However she should be allowed to remove her personal belonging from the matrimonial home.

Consequently, 1. I dismiss prayers nos 2, 3,4, and 5 of the application with no orders as to costs.

2. I order that prayers nos 6 and 7 be heard de novo and that parties be at liberty to file supplementary affidavits.

3. The respondent do release all the personal belongings of the petitioner from the matrimonial home forthwith

4. Liberty to apply

Miss Mwangi present Mr. Gathara present Parties present

E.M. Githinji

Judge

6.10.99