

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 335 OF 1997

N W.....APPLICANT

versus

M M.....RESPONDENT

R U L I N G

There is a Divorce petition still pending for hearing between the parties herein, before the S. R. M's Court, Nairobi.

The prayers in that petition are that(a) The marriage between the petitioner and respondent be dissolved; (b) The petitioner be granted custody care and control of the minor children of the marriage and (c) The respondent be condemned to pay costs of this suit and incidentals to proceedings.

Going by the court stamps, the said petition was filed on 30th September,. Alongside the said petition the petitioner also filed an application under a certificate of urgency by way of chamber Summons under section 17 and 30 of the Matrimonial Causes Act Cap.152 Laws of Kenya and order 39 Rules 1,2, and 3 of the Civil Procedure Rules and section 3A of the Civil Procedure act. The orders sought in that application were that in the applicant/petitioner and the three children of the marriage be re-instated back to the matrimonial home and the respondent be ordered to move out of the said home 2- That the applicant be no longer bound to cohabit with the respondent pending the determination of the suit hereof; 3-

That the respondent be restrained from assaulting, coercing, harassing or threatening the applicant and the minor children of the marriage; 4 The custody of the 3 minor children of the marriage be granted to the applicant hereof and;5- costs of the application.

The learned trial magistrate heard the application and granted the orders sought. In so doing the respondent was ordered to vacate the premises and in default to be evicted. The officer commanding Buruburu Police Station was to oversee the process.

The appellatant was aggrieved by that decision hence this appeal.

In the record from the lower court and even in his submissions before this court, the appellatant has repeatedly stressed his contribution towards the acquisition of the matrimonial home and that he is a co-owner with the respondent. I believe those are matters the learned trial magistrate should have addressed with some caution before she made the orders that she did.

Be that as it may, the application that came before the learned trial magistrate was interlocutory pending the hearing of the divorce petition. Its foundation was the petition which was the substantive suit. That being the case, the interlocutory orders must relate to the orders sought in the petition.

With respect, that was not the case. The only order that is related to the petition is that of custody of the children. The rest of the orders sought in the Chamber application were not in the petition and therefore could not be addressed at interlocutory stage. Put another way; had the petitioner not filed the chamber application, and the divorce petition proceeded to hearing and succeeded; the only orders the court could grant are those sought therein.Prayers 1,2, and 3 of the said application were therefore wholly misplaced and therefore unsustainable.

Looking at the way the parties have conducted themselves, I have no doubt that the application was

intended to oppress the appellant and unfortunately the court aided that step. I cannot uphold such orders. Further, even if the learned trial magistrate were right to grant the said orders the services of the police should not be enlisted in view of the clear provisions of the Civil Procedure Rules Order 21 Rule 28 thereof.

Accordingly this appeal succeeds, the status quo ante the said orders shall be re-instated and maintained until the divorce petition is heard. The appellant shall have the costs of this appeal.

Orders accordingly.

Dated and delivered at Nairobi this 13th day of July, 1998

A. MBOGHOLI MSAGHA

JUDGE

Appellant in person/present

No appearance for the respondent