



ZAG (Suing as Mother on behalf of the minors) v VOM (Divorce Cause E087 of 2022) [2022] KEKC 145 (KLR) (21 July 2022) (Ruling)

Neutral citation: [2022] KEKC 145 (KLR)

REPUBLIC OF KENYA
IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)
DIVORCE CAUSE E087 OF 2022
AH ATHMAN, SPK
JULY 21, 2022

BETWEEN

ZAG APPLICANT

SUING AS MOTHER ON BEHALF OF THE MINORS

AND

VOM RESPONDENT

RULING

1. The petitioner's Notice of Motion dated 11 May, 2022 seek orders that she be vested with actual custody of the minors, an injunction do issue restraining the respondent from assaulting the applicant, ingressing or egressing any house the applicant would be occupying, the respondent be compelled to continue paying rent and respondent be compelled to pay KES 70,000.00 per month, minor's school fees and related expenses.
2. The applicant deposed that the parties were married under Islamic law and were blessed with two children, that they started a business at [particulars withheld] shopping center, Nairobi called '[particulars withheld] company' (hereinafter referred to as 'the company') where she earned and received a monthly allowance. She averred that they had marital problems and the respondent moved out of the matrimonial home but forcibly entered the house in April 2022 and threatened to kill her. She deposed further that she reported to the police and the children's department where they entered a parental responsibility agreement, which she is unable to comply with due to lack of receipt of her allowance from the company.
3. The respondent, in opposition, filed a replying affidavit dated June 3, 2022. He deposed that he started a business for the applicant and started the company on his own but she demanded to run it and interfered with the its operations and finances which led to their marital problems. He further deposed that the applicant is of violent disposition, drinks alcohol and parties to the wee hours of the morning and has severally not been properly using funds intended for sustenance to the interests of the minors.



He averred that they signed a parental responsibility agreement with the Starehe Sub County children's office which gave each party specific duties. He contends she failed to comply with her part. He stated that he has been constructively evicted from his own matrimonial home which he had left on her wishes and for his safety.

4. This divorce matter seeks orders for dissolution of marriage, division of matrimonial property, custody, care and control and maintenance. Dissolution of marriage, division of matrimonial property and even rate of maintenance raise questions of facts that can only be properly determined upon hearing of both parties' cases and analysis of evidence thereof. Questions of facts, in my considered view cannot be determined purely on the strength of affidavit evidence. At this interlocutory stage, the issues remaining for determination in this application are only two: the rate of children maintenance and the issue of injunction against the respondent. Interim physical custody is not contested and the respondent agreed to continue paying rent for the matrimonial home in [particulars withheld] and school fees of the minors.
5. The applicant prays for KES 70,000.00 per month as sustenance on the grounds that the respondent is an engineer and runs the company while she is no longer employed or gets allowance from the company. The respondent contends he has been providing for the minors pursuant to the parental responsibility agreement which the applicant must adhere to. In the proceedings through his advocate, he offered to pay KES 10,000.00 per month for food of the minors.
6. Strictly under Islamic law, the fathers of children have the sole responsibility for financial provisions for their children based on their ability. It is well founded on the provisions of Q.4.4 and numerous Islamic traditions and there is juristic consensus among Muslim jurists on its prerogative. Its quantum, however, is not standard but dependent on the balance of the twin factors of needs of the wife and children and financial ability of the husband as espoused under Q.65.35 read together with Q.2.233.
7. The actual needs for food for the family need to be ascertained. The respondent has not disputed he is employed as an engineer. The ownership and income from the company is in dispute. Considering the respondent has been compelled to rent for alternative accommodation and incur further costs for food, and considering he is settling, school fees and rent for the matrimonial home the parental responsibility agreement notwithstanding we order that he pays KES 25,000.00 per month as sustenance in the interim.
8. For an order of injunction to issue the applicant must sequentially demonstrate a prima facie case with probability of success, show damage he or she will suffer if order is not granted and that same cannot be compensated by way of damages. In *Giella Vs Cassman Brown & Co Ltd.* [1973] E.A.358 the court stated:

"The conditions for the grant of interlocutory injunction are now, I think, well settled in East Africa, First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience".
9. Regarding the sequence of granting interlocutory injunction, the court in John *Ngumo Murere Vs Muriuki Karue & 7 Others* [2006] eKLR cited with approval the court of appeal case in *Kenya Commercial Bank Vs Afraba Education Society* [2001] 1 EA 86 (CAK) as follows:

"The sequence of granting interlocutory injunction is firstly, that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour; secondly, that such an injunction will not be normally granted unless the applicant



might suffer irreparable injury; and thirdly, when the court is in doubt it will decide the application on the balance of convenience. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt the third condition can be addressed."

10. The purpose of injunctions is to shield a party against violation or threat of violation of his or her legal rights. It ought not be to intimidate others or cause violations on other persons rights. In the case of *Mobile Kitale service station vs. Mobil Oil Kenya Limited & Another* Civil Case 205 Of 1999 Kisumu, [2004] eKLR, the Court, Warsame J, held:

"in my view the object of granting an interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable. While an interlocutory injunction, being an equitable remedy, would be taken away [discharged] where it is shown that the person's conduct with respect to matters pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter. The orders of injunction cannot be used to intimidate and oppress another party. It is meant to protect the fence of the person who obtained the said orders. It is a weapon only meant for a specific purpose - to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking it."

11. In the case of *Locabail international Finance Ltd. v. Agroexport & others* [1986] 1 ALL ER 901 it was held:

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff."

12. In the instant application, there is scant and inconclusive evidence of respondent's alleged threats or violence. On his part the respondent alleges it is the applicant who is violent. If granted, the rights of the minors and the respondent to access the children and a house for which he is still paying rent would be infringed. Damage will also be suffered by vulnerable minors, a situation that offends the dictates of law. Consequently the prayer for injunction restraining the respondent from entering the matrimonial home is hereby rejected.

13. In conclusion the orders granted are as follows:

- a. Interim physical custody of the party's minor children is granted to the applicant, the respondent to get unlimited but reasonable access. Both parties have equal legal custody of the minors.
- b. The respondent to pay children maintenance as follows:
 - i. Sustenance - KES 25,000.00 per month
 - ii. Accommodation at the Matrimonial home in [particulars withheld] - Nairobi
 - iii. School fees be paid directly to school.
- c. Prayer for injunction against the respondent is not granted
- d. Costs be in the cause.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON 21ST JULY, 2022

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of

Ms. Judith Ndori, Court assistant

Mr. Yusuf for the applicant

Mr. Ambala for the respondent

