



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 125 OF 2013

J W R.....PLAINTIFF/APPLICANT

VERSUS

G G G.....DEFENDANT/RESPONDENT

RULING

The Plaintiff in her application dated **24th January 2013** seeks the following orders:

1. Spent

2. A temporary order of issue reinstating the Plaintiff and her children into the matrimonial home on LR No. Kabete/Kibichiku/[Particulars withheld] to be enforced by the Officer in Charge of Kibiku Police Post.

3. A temporary order do issue restraining the Defendant by himself, his agents, employees and/or servants from interfering with the Plaintiff's quiet possession of LR No. Kabete/Kibichiku/[Particulars withheld].

4. Pending the hearing and determination of the main suit, the Plaintiff be at liberty to lease out the home on LR No. Kabete/Kibichiku/[Particulars withheld].

5. Costs of the application be provided for.

The application is premised on grounds outlined thereunder and supported by an affidavit sworn by the Plaintiff/Applicant. The Plaintiff deposed that she is married to the Defendant since **1993** and blessed with two children currently aged 18 and 16 years old. It is her case that she and the Defendant jointly acquired a plot which was registered in their joint names wherein they constructed their matrimonial home. They have been living thereon though the Plaintiff alleges that it has been an abusive marriage. It is her deposition that on **12th December 2007**, while she was at work, the Defendant hired a lorry and carried away their household goods to his bachelors pad in his father's compound and removed the doors and windows of their house.

As a result of the Defendant's action, she moved into a rented house at the shopping center wherein she lived with the two children. Soon after she moved out, the Defendant replaced the doors and windows and

moved back into the house and in **February 2012**, the Defendant married another wife and took her to the said house. The Plaintiff states that on **29th April 2012**, a family meeting was convened in company of three (3) village elders and the Defendant's father wherein it was agreed that the Defendant's new wife would vacate the matrimonial home by **December 2012**, but which she has failed to do.

The Plaintiff contended that it would be in the interest of justice that the new wife be ordered to vacate the matrimonial home. Further, that the Defendant be restrained from living in the matrimonial home and that the same be released to her to rent out so that she can supplement her income since whatever she makes as a Tailor is not sufficient to educate the children as well as pay rent. In the alternative, the Court orders for the sale of the house and supervise the distribution of the proceeds between herself, the Defendant and their children. The Plaintiff states that the Defendant will not suffer any prejudice as he still maintains his bachelor pad and that he has since invested by building rental rooms where he gets an income but does not support her and the children.

This application was opposed by the Defendant/Respondent who swore a Replying Affidavit on **19th February 2013**. It is his deposition that he is not averse to the Plaintiff/Applicant and his biological children being reinstated back to the matrimonial home. He admits that the property was purchased jointly and that the Plaintiff did assist in the construction of the house. The Defendant denied the allegation that he is abusive and deposed that conversely, it is the Plaintiff who deserted him and left with their children at the time aged 8 and 10 years. He further deposed that efforts on several occasions to salvage their marriage even in the presence of the elders bore no fruit as the Plaintiff/Applicant showed no interests in returning to the home.

The Defendant/Respondent deposed that he is willing to provide his second wife with an alternative housing to pave way for the Plaintiff/Applicant and the two children to occupy the home. He however urged the Court not to order his eviction as he has nowhere else to call home and that he is ready to live with the Plaintiff/Applicant and their children, and thereby the order for eviction will extremely be prejudicial to him. In respect of the rental rooms, the Defendant/Respondent deposed that the same are not habitable as they are not complete due to financial difficulties.

The Plaintiff/Applicant swore a Supplementary Affidavit on **17th April 2013** wherein she deposed that they are ready and willing to be reinstated into their matrimonial home on condition that the Defendant/Respondent gives a commitment that the second wife will vacate on the date of reinstatement. The Plaintiff/Applicant urged the Court to caution the Defendant/Respondent against domestic violence as well as give her protection for peaceful cohabitation deposing that she was forced to leave the home due to the Defendant's violent nature. The Plaintiff also urged the Court to order the Defendant to give an undertaking on payment of school fees as he is in the habit of affirming his willingness to pay but regressing on his word.

The Plaintiff/Applicant also filed submissions in further support of her claim, which I have carefully read. It is not in contention that the subject matter of this application was jointly acquired and is registered in the joint names of the parties. On the subject property, the parties jointly constructed a home. However, the Plaintiff/Applicant and the children do not live in the said home because of the Defendant's violent nature. This is vehemently opposed by the Defendant/Respondent who alleges that the Plaintiff/Applicant is the one who deserted the home. The Defendant/Respondent currently lives on the property with his second wife. The Plaintiff desires to return to the home but on condition that the new wife vacates the house. The Defendant/Respondent on his part confirms that he is not averse to the said demand and also avows his willingness to provide alternative housing to his new wife. Therefore, since Prayer 2 is not in contention, I will allow it on terms to be specified hereinafter.

The Plaintiff/Applicant also prays that the Defendant/Respondent be restrained from interfering with her quiet possession and that she be given authority to lease out the home. In the supporting affidavit, the Plaintiff/ Applicant asked that an order be granted for the sale of the house and the proceeds be shared amongst them. As admitted by both parties, the subject property is their matrimonial home which was jointly acquired and is jointly registered. Whereas it is not in contention that the Plaintiff/Applicant is not living therein, what is contentious is the reasons advanced. The Plaintiff/Applicant claims that domestic

violence drove her out of her home, whilst the Defendant/Respondent asserts that the Plaintiff/Applicant deserted their matrimonial home. Notably, however, the Plaintiff/Applicant did not avail police reports or P3 Forms to prove the allegations. Consequently, this Court finds that the Plaintiff/Applicant has not established a basis for grant of these orders.

It is without doubt that there are concerns that the Plaintiff/Applicant raised in her affidavits in support of her claim wherein she urged the Court to (a) caution the Defendant/Respondent on domestic violence and provide protection; and (b) Order the Defendant/Respondent to give an undertaking to pay school fees for the children. I wish to point out to the Plaintiff/Applicant that this is not the proper forum to address matrimonial disputes and issues of child maintenance. The jurisdiction of this Court is clearly stipulated in the Constitution at **Article 162(2)** and the **Environment and Land Court Act**, to wit, to hear and determine disputes relating to the environment and the use and occupation of, and title to land.

Having now considered the Notice of Motion dated 24th January, 2014 in totality and the written submissions, the Court make the following orders:-

“1. The Plaintiffs/Applicant’s application is allowed in terms of prayer No.1 and further”

I hereby make the following orders:

“The Defendant is hereby directed to ensure that his second wife vacates the house on LR Kabete/Kibichiku/[Particulars withheld] within 45 days from the date hereof. At the lapse of the 45 days, the Plaintiff /Applicant be at liberty to return to the home.

Parties to bear their own costs.”

It is so ordered

Dated, Signed and Delivered this 10th day of June, 2016

L. GACHERU

JUDGE

In the Presence of:-

No appearance: For the Plaintiff/Applicant

No appearance: For the Defendant/Respondent Ruling date taken in Court

James Court Clerk

L. GACHERU

JUDGE