



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO 113 OF 1995

C N KPETITIONER

VERSUS

R M K.....RESPONDENT

RULING

The respondent in this petition, **R M** filed this Chamber Summons on 27.10.95 under various provisions of law: S. 7 Guardianship of Infants Act, rule 2(a) thereunder; Rules 3 (2), 40 (1), 50, and 51 of the Matrimonial Causes Rules; S. 3A CPA and O 39 r. 2 (1) CPR. She prayed for several orders against the petitioner, **C K**. In paraphrase she prayed for:-

1. The custody of the 3 children of the marriage both Minors – **W A** (11 years), **W R** (10 years) and **N J** (3 years) whom she left at the matrimonial home when, according to her affidavit, the petitioner forced her out by violently assaulting her on or about 17.10.93 when trying to throw her out of that home.
2. The Respondent also asked for alimony and maintenance for herself and the children until this petition is determined.
3. The Respondent further prayed for a injunction to issue against the petitioner so that he does not step in the matrimonial home which she should be allowed to occupy and to remain therein with the children until settlement of the marriage property issues.
4. And in conclusion the Respondent prayed that the petition be ordered to release the family car registration no KXQ to her for her use and the children until the whole matter is determined finally by the court.

To this application an affidavit was attached. Also file was a reply to the petition which the petitioner filed on 16.10.95 praying this court to annul their marriage on grounds he enumerated particularly based on cruelty. He asked for custody of the children; an order to restrain the respondent from coming to the matrimonial home or molesting and / or interfering with anybody or anything there.

The affidavit in support of this application narrated incidents of cruelty by the petitioner, physical and mental. Her reply to the petition said as much but that awaits the full hearing of this petition.

In essence the respondent stated that due to the cruel acts and conduct of the petitioner she had ran away from home for her own safety and it was submitted that she was now living with a sister in South C,

Nairobi. Thus she had left the home and the children of tender age in the hands of the petitioner. She considered that their welfare and interest demanded that they should be with her and not the father. The court heard that the respondent had no steady job except doing some odd bits here and there, the petitioner having withdrawn and withheld all the financial support as well as throwing her out of their horticulture business.

To demonstrate aspects of cruelty by the petitioner, the respondent exhibited documents relating to a criminal case in a Nairobi court where the petitioner was charged with assaulting the respondent on or about 18.10.95. A doctor's note also appeared referring to the assault.

The petitioner on his part filed a replying affidavit and in the true nature of such proceedings denied what was leveled against him by the respondent and narrated volumes of his own tribulations. He added that the respondent had run away from home leaving the children with the petitioner.

Mr Kibuthu who appeared for the respondent ably laid before this court the principles and decided cases plus the applicable law relating to custody of children of tender age. He rightly stated that, except for other very sound cause, the children especially of the age of those before this court should be given to the mother. Focusing primarily on their welfare, it is better entrusted to the mother. Mr Kibuthu went on to submit why in these circumstances the respondent should be put into the matrimonial home whereupon the petitioner is excluded until this divorce is determined. The court heard the basis and principle on which alimony and maintenance should issue in this case.

Mr Oluoch rose to answer on behalf of the petitioner. While agreeing on the general principles regarding awarding of the custody of children in such cases, normally it should be to the mother, Mr Oluoch submitted that the respondent had nowhere to take them as she was staying with the sister; the children had remained with the petitioner before, when the respondent left them and he had ensured that they were well taken care of. They should remain in the home they know; they are not ailing and in any case the respondent will be granted reasonable access to them.

On the aspect of alimony and maintenance Mr Oluoch submitted that the respondent had not filed any affidavit or documents relating to income from which alimony could be paid. But the court observed that the petitioner could as well have done this. The respondent had however shown some figures of income she expects in case she gets a contract with a firm in town. To Mr Oluoch the issue of maintenance of the children especially should not arise as the petitioner is already doing that. He has the children at home. He saw no reason to restrain the petitioner from being in the matrimonial home since he has always been there as opposed to trying to come in by throwing the respondent out. To Mr Oluoch from the cited cases, he came across none that threw out a sitting spouse and full hearings went on before the orders prayed for were granted or refused.

Now this matter is only at an interlocutory stage. This court cautions that in making the ruling it should not appear to be determining the petition. That will be at the full hearing. So in a brief ruling, this court is of the view at this juncture that the 3 children of the marriage remain where they are with the petitioner. At least everybody is sure of this. The respondent should be allowed reasonable access to them.

Alimony may not issue as no adequate evidence is before this court to determine it. Similarly maintenance is refused.

The petitioner will not be ordered out of the matrimonial home. He will remain there with the children and he will also remain with the car.

Until this petition is determined or other orders are made in case of the parties exercise the liberty to apply, those are the orders of the court for the time being. Those orders of the court are arising from the pleadings, cited cases, submissions and the applicable law as carefully considered.

The Chamber Summons is dismissed.

Dated and delivered at Nairobi this 30th day of November , 1995

J.W. Mwera

JUDGE



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