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IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO.1410/93

In the matter between:

BUSISIWE ALICE MAZIYA

Applicant

and

ALFRED VELAPHI MAZIYA

Respondent

C O R A M : DUNN J.

FOR THE APPLICANT : MR P. M. SHILUBANE

FOR THE RESPONDENT: MR C.J. LITTLER

JUDGMENT

22/10/93

The parties to this application were married to each other according to Swazi Law and Custom on the 1st December 1985. Three minor children were born of the marriage. It would appear that as from 1989, the respondent started assaulting the plaintiff accusing her of infidelity. The assaults by the respondent resulted in the applicant leaving the matrimonial home with the three minor children. The assaults and threats thereof continued despite the applicant having left the matrimonial home and the applicant was obliged to seek an order restraining the respondent from further assaulting and/or threatening the applicant. An order to that effect was granted by the High Court on the 16th August 1993. The order was served on the respondent.

In the present application which was filed on the 8th September 1993, the applicant seeks an order -

- (i) ejecting the respondent from Lot, No. 2330 Mbabane Extension No.2,
- (ii) awarding custody of the three minor children to the applicant.

The applicant sets out that she is the registered owner of the property in question by virtue of Deed of Transfer No.475/1990 dated 30th August 1990. She states that she was compelled to move from the property as a result of the assaults and threats by the respondent. The respondent was apparently left in occupation of the property. The applicant states at paragraph 8 of her affidavit -

I fear that if I return to live with respondent he will continue with his assaults and I accordingly pray for an order ejecting him from my property because I have no other place at which to live with my aforesaid minor children.

There is no allegation that the respondent is in breach of the court order of the 16th August.

The application is opposed by the respondent on the grounds that the registration of the property into the applicant's name was fraudulent and in contravention of section 16 of the Transfer Duty Act No.37/68. The respondent further submits that he made a contribution towards the development of the property and that he is in the circumstances at least a part owner of the property. The respondent then sets out at paragraph 2.6 that the dispute between the parties "has already been enrolled before the chief's court at KaLanga that being the requisite procedure for having the matter (if the need arises) ultimately adjudicated upon by a Swazi national Court having the necessary jurisdiction."

The applicant's ownership of the property cannot, in my view, be challenged in the present application. The property is registered in the applicant's name and unless and until such registration is set aside the respondent cannot raise fraud as a defence to the present application. The application will in the circumstances be approached on the basis that the applicant is the owner of the property.

Mr Shilubane for the applicant referred to the case of **BADENHORST v. BADENHORST** 1964(2) S.A. 676 for the submission that a wife has a right in certain circumstances to eject her husband from property owned by her. The cases of **HAMMAN v. HAMMAN** 1949(1) S.A. 1191 and **GORULNICK v. GORULNICK** (1958)1 ALL E.R. 146 (C.A.) were considered in the **BADENHORST** case in which Vieyra J. stated at p679 -

My view is that a wife has no right to seek to eject her husband from the matrimonial home merely because the property belongs to her. Because he is her husband he has rights flowing from the marriage which in relation to that property put him in a category differing toto coeli from that of a stranger. The wife's right to eject him must therefore flow from considerations which to a great extent must depend on the merits of the matrimonial dispute.

The position in the cases referred to was that matrimonial proceedings were pending at the time of the proceedings for ejectment. The proceedings for ejectment in those cases were considered in the light of the pending matrimonial proceedings. That is not the position in the present case. The applicant has denied the allegation by the respondent that the dispute between the parties has been reported to a Swazi customary court. The reason for the application is that the applicant fears that the respondent will continue assaulting her if she returns to the property. That is not in my view sufficient to justify the grant of the relief sought. The applicant is armed with a restraining order against the respondent. Non-compliance with the order can be dealt with by the court, whilst the parties are living under one roof.

The application is refused. I make no order as to costs.



B. DUNN

JUDGE