REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE NO. 22 OF 2017

FS......................DEFENDANT/APPLICANT

VERSUS

EZ.....................PLAINTIFF/RESPONDENT

RULING

[DEFENDANT'S NOTICE OF MOTION DATED 5TH FEBRUARY, 2018]

1. The Applicant/Defendant, FS, and the Respondent/Plaintiff were husband and wife from 10th March, 2004 until 3rd September, 2015 when their marriage was dissolved vide Malindi Divorce Cause No. 6 of 2014. Thereafter, the matrimonial property was distributed on 28th April, 2016 through Malindi Divorce Cause No. 16 of 2014 (O.S.).

2. In the plaint dated 4th October,2017 and filed in Court on 21st November, 2017 the Respondent avers that between 2nd March, 2011 and 17th January, 2014 when the parties were still residing together, the Respondent sent an aggregate sum of USD 492,799.63 which is equivalent to Kshs. 51,251,161.52 to finance the construction of a residential house on plot portion number [particulars withheld] in Malindi.

3. It is the Respondent's averment that the said house which was awarded to him during the division of the matrimonial property is incomplete even though the money sent to the Applicant was adequate to complete the construction of the house. The Respondent further avers that as per a valuation conducted on 17th December, 2015, the value of the incomplete house including the plot upon which the house stands was Kshs. 38,500,000 thus raising pertinent issues of accountability on the part of the Applicant.

4. The Respondent further avers that although the bank account used to make the transactions was in their joint names, the Applicant had the sole access and control of the account. It is the Respondent's statement that his attempt to access the bank account held with Barclays Bank of Kenya has been rejected by the bank on the basis that the account is not a joint account. He was thus unable to ascertain the bank balance as at 28th April, 2016 so as to demand his fair share of the sum in the account as was awarded to him in Malindi Divorce Cause No. 16 of 2014 (O.S.).

5. It is the Respondent's averment that in order to facilitate the sharing of the funds in the bank account, the Applicant should be compelled to avail bank statements for account number 1067633 with Barclays Bank of Kenya for the period 2nd March, 2011 to 28th April 2016. He also seeks an order compelling the Applicant to produce all the documents relating to the construction of the said house.

6. Through the plaint the Respondent therefore prays for judgement against the Applicant as follows:

> **"a. An order for accounts for the sum of USD 492,799.63.**
>
> **b. An order for payment of any sums that will be found due to the Plaintiff after the accounts.**
>
> **c. An order for payment of an amount equivalent to a half of the bank balance of account number 1067633 as at 28th April 2016 (if any) in compliance with the judgement in Malindi Divorce Cause No. 16 of 2014 (O.S.).**
>
> **d. An order that any amount found due to the Plaintiff be paid with interest at court rates.**
>
> **e. Costs of the suit.**

f. Any other or further relief as this Honorable Court may deem fit and just to grant."

7. On 7th February, 2018 the Applicant filed the notice of motion dated 5th February, 2018 brought under Order 2 Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 (CPR) and sections 3 and 3A of the Civil Procedure Act, Cap. 21 (CPA) and prays for orders as follows:

"1. That the pleadings filed by the Plaintiff/Respondent on 21st November, 2017 and dated 4th October, 2017 be struck out with costs.

2. That the costs of the application be provided for."

8. The application is supported by the grounds on its face and a supporting affidavit sworn by the Applicant.

9. In summary, the Applicant's case is that the Respondent's case is fatally defective, frivolous, vexatious and without any chance of success. Further, that the suit is only meant to offend and annoy her and is thus a waste of the court's precious time as well as an abuse of the process of the court.

10. In her affidavit, the Applicant avers that the issues raised in the instant suit by the Respondent had already been addressed in the matrimonial cause or ought to have been raised therein. Further, that the account with Barclays Bank of Kenya is not a joint account as it is solely in her name. In her opinion, the Respondent is simply on a fishing expedition as he is not ready and willing to put an end to litigation as regards the matrimonial property acquired during the subsistence of their marriage. She therefore prays for the striking out of the Respondent's suit.

11. The Respondent opposed the application through an affidavit sworn on 25th April, 2018 by his advocate Mark Ndumia Ndung'u.

12. In brief the Respondent's case is that the orders he seeks in this suit flows directly from the orders issued in Malindi H.C. Matrimonial Cause No. 16 of 2014 (O.S.) wherein one of the orders issued was for equal sharing of the money in the Barclays Bank account. Further, that the court had awarded him the house.

13. Explaining why he did not take up the issue of accounts in regard to the construction of the house in the matrimonial cause, the Respondent states that the valuation report he relies on was prepared upon the issuance of an order by the Court and by the time the same was filed on 25th February, 2016, the parties had closed their cases and filed their submissions. He therefore could not take up the issue in the matrimonial cause.

14. The Respondent urges this court to find that his claim is valid and dismiss the Applicant's application.

15. The advocates for the parties filed and exchanged submissions which they later highlighted. I have perused those submissions and they will be taken into account in this ruling.

16. A perusal of the pleadings and the submissions in regard to the instant application will show that the Applicant seeks the dismissal of the Respondent's case for being frivolous, vexatious and an abuse of the court process on account that the issues raised in the suit are *res judicata.*

17. The core provision under which the application is brought is Order 2 Rule 15 of the CPR. It states:

"Striking out pleadings [Order 2, rule 15.]

1. At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

a. it discloses no reasonable cause of action or defence in law; or

b. it is scandalous, frivolous or vexatious; or

c. it may prejudice, embarrass or delay the fair trial of the action; or

d. it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

2 No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.

3. So far as applicable this rule shall apply to an originating summons and a petition."

18. The power granted to the court under the cited rule should only be exercised sparingly in situations where it is so plain that a plaintiff has no case or a defendant's defence is a sham. This was explained by the Court of Appeal in its introduction to its judgement in **Kivanga Estates Limited v National Bank of Kenya Limited [2017] eKLR; Civil Appeal No. 217 of 2015 (Nairobi)** when it stated that:

"It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations.

Although the court exercises discretionary powers in striking out pleadings, because of its far reaching consequences, order 2 rule 15 of the Civil Procedure Rules, has established clear principles which guide the court in the exercise of that power in the following terms;

"15.(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that —

a) it discloses no reasonable cause of action or defence in law; or

b) it is scandalous, frivolous or vexatious; or

c) it may prejudice, embarrass or delay the fair trial of the action; or

d) it is otherwise an abuse of the process of the court....and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be." (Our emphasis)."

19. When can a suit be said to be an abuse of the court process? John M. Mativo, J answered this question in **Graham Rioba Sagwe & 2 others v Fina Bank Limited & 5 others [2017] eKLR; Nairobi High Court, Constitutional & Human Rights Division, Petition No. 82 of 2016** when he stated that:

"The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

(a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.

(d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

(e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[8]

(f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

(g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

(h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[9]"

20. In my view, a matter that seeks to litigate issues that have already been litigated before a court of competent jurisdiction between the same parties or their surrogates is one that should be put to rest for failing to disclose a reasonable cause. Such a matter is not only scandalous, frivolous or vexatious but is also an abuse of the process of the court. Once a party establishes that the claim or defence of the opposing party is attended by the aforesaid characteristics, then such a party is entitled to seek dismissal of the plaintiff's claim or the striking out of the defendant's defence.

21. The ingredients of the *res judicata* doctrine were stated by the Court of Appeal in the case of the **Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR; Nairobi CA Civil No. 105 of 2017** thus:

"Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements

must be satisfied, as they are rendered not in disinjunctive but conjunctive terms;

a. The suit or issue was directly and substantially in issue in the former suit.

b. That former suit was between the same parties or parties under whom they or any of them claim.

c. Those parties were litigating under the same title.

d. The issue was heard and finally determined in the former suit.

(e)The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

22. The Court of Appeal proceeded to explain the purpose of the doctrine of *res judicata* as follows:

> **"The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice."**

23. The extensive nature of the doctrine of *res judicata* was discussed by the Court of Appeal of Eastern Africa in **Gurbacham v Yowani Ekori [1958] EA 450** wherein a passage from the Judgement of the Vice-Chancellor in **Henderson v Henderson (1), 67 E.R. 313** is reproduced as follows:

> **"In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time."**

24. The law as gleaned from the cited cases is that a party who has had his day against an opponent before a court of competent jurisdiction in respect of a certain dispute should not be allowed to reopen the contest. The *res judicata* principle is meant to ensure that only matters that have not been addressed by the courts should be entertained.

25. The question therefore is whether the suit before this court offends the principle of *res judicata*.

26. The pleadings which are essentially not disputed shows that after the marriage between the Respondent and the Applicant was dissolved, the Applicant moved to court vide Malindi Matrimonial Cause No. 16 of 2014 (O.S.) for distribution of the matrimonial property.

27. At the conclusion of the trial, my brother Chitembwe, J gave the Respondent herein motor vehicle registration number KBM 825Y and plot portion number 2910. The Applicant was given Plot Number 10496 together with household goods therein. The learned Judge further ordered that any money held in the **"joint account at Barclays Bank in Kenya shall be shared equally."**

28. The Respondent's challenge to the distribution at the Court of Appeal vide Civil Appeal No. 52 of 2016 (Malindi) was dismissed on 25th day of January, 2018.

29. The Respondent's plaint as filed herein shows that one of the prayers the Respondent is asking for is that the Applicant renders an account of the monies he sent her for the purposes of constructing the house on plot portion number 2910. Marriage is not a business transaction where partners are expected to keep receipts of each and every single coin expended. In distributing the estate, Chitembwe, J was alive to the fact that the money came from the Respondent. When he asked for the valuation of the two plots he did so with a view of appreciating the prices of the properties before embarking on the distribution of the estate. He did not intend that the valuation reports be used to open another round of litigation. The distribution must have taken care of everything touching on the properties acquired during the marriage. The Respondent cannot be allowed to now claim that the Applicant **"misappropriated"** the money he gave her to construct the house on plot portion number 2910.

30. The Respondent has attempted to justify this suit by claiming that the valuation he now relies on came at the tail end of the litigation. As already stated, the valuation was done for the court's own consumption. It is also observed that nothing stopped him from valuing the properties before the distribution proceedings were concluded.

31. The issue of the alleged misappropriation of funds by the Applicant is one that could have been taken up by the Respondent in the matrimonial cause. He did not take it up and he should forever maintain his silence on that issue. Allowing him to resurrect the issue through fresh litigation will breach the *res judicata* rule.

32. The question of the statement of the Barclays Bank account is one of execution of the judgement in the matrimonial cause. Filing a fresh suit in order to ask for the statement of that account actually amounts to an abuse of the process of the court.

33. The bottomline of the Respondent's suit is that he seeks to overturn through these proceedings both the decisions in the matrimonial cause and the appeal arising therefrom. In doing so he has become a frivolous and a vexatious litigant. His actions, if not stopped at this point, will not only irritate the Applicant but will also waste the court's time. His claim is an abuse of the process of the court for being *res judicata.*

34. In the circumstances, I find the Applicant's notice of motion dated 5th February, 2018 merited. Although the Applicant asked for a striking out of the Respondent's pleadings, the correct order as per Order 2 Rule 15 CPR is to dismiss the suit. The Respondent's suit is therefore dismissed.

35. Ideally, a family dispute like the instant one should not result in the loading of costs on any of the parties. In the instant case, however, it is clear that the Respondent has gone overboard. He has refused to acknowledge that his marriage is over and he should move on. Litigation is expensive and a party should not be dragged to court unnecessarily. For the stated reasons I am forced to award costs to the Applicant. The Applicant will therefore have costs from the Respondent for the application and the entire suit.

Dated, signed and delivered at Malindi this 24th day of January, 2019.

W. KORIR

JUDGE OF THE HIGH COURT