



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 8 OF 2007 (OS)**

**RHODA MUTAVE MULWA.....APPLICANT**

**VERSUS**

**GREGORY MULWA.....RESPONDENT**

**RULING**

1. Through a Notice of Motion dated 16<sup>th</sup> December 2014 but filed on 22<sup>nd</sup> January 2015, the applicant sought orders as follows:

**(a) That this honourable court be pleased to grant the applicant herein leave to amend the Originating Summons instituting this suit dated 18<sup>th</sup> December 2007 as per the draft herein.**

**(b) That the annexed draft amended originating summons supported by an affidavit be deemed as duly filed upon payment of the requisite court filing fees.**

**(c) That in addition to the foregoing, an order of injunction does issue against the respondent herein barring him, his agent and/or assigns in any way interfering with any of the property the subject of this suit pending the hearing and determination of the suit.**

**(d) That the costs of this application be in the cause.**

2. Application which is filed pursuant to orders 8 rule 3 and 4, 51 rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya, is premised on grounds on the face of it and affidavit deponed on 16<sup>th</sup> December 2014 by the applicant one Rhoda Mutave Mulwa.

3. On the 20<sup>th</sup> February 2007, the applicant herein petitioned this court through an originating summons dated 18<sup>th</sup> December 2005 seeking division of matrimonial property in accordance with Section 17 of the Married Women's Property Act of 1882. However, following the enactment of Matrimonial Property Act 2013 replacing the Married Women Property Act 1882, the applicant decided to file the instant application so as to amend the original originating summons to be in tandem with the current Matrimonial Property Act 2013 Sections 7, 9, 14, 17 and 18.

4. Secondly, the applicant contended at Paragraph 8 of her supporting affidavit that she had received reliable information to the effect that the defendant was planning to dispose and or sell some of the properties which forms part of the matrimonial property in question. She therefore sought conservatory orders preserving the property pending hearing and determination of the suit herein.

5. Despite service of the application and even the hearing notice upon the defendant, the defendant did not bother to file any replying affidavit or even appear for the hearing. Essentially, the application is not opposed.

6. I have considered the application herein, supporting affidavit and oral submissions by counsel for the applicant. Amendment of pleadings is clearly governed by Order 8 rule 3 of the civil procedure rules which provides that:

**“subject to Order 1, rules 9 and 10, Order 24, rules 3, 4,5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow a party to amend his pleadings”.**

7. From the wording of Order 8 rule 3, the unfettered power and or discretion to direct amendment of pleadings purely lies with the court.

What prejudice will the defendant herein suffer if the claim is prosecuted under the Matrimonial Property Act 2013? I do not see any prejudice that will be suffered if the court allowed the amendment sought. In any event, the application has not been challenged leave alone the original claim. Accordingly, prayer 1 of the application is allowed and the draft amended copy of the originating summons is hereby deemed as duly filed in terms of prayer 2.

8. Secondly, the prayer for an injunction to preserve the property in question is quite important if the integrity and eventual outcome after full hearing is to be insulated against abuse in case the prayers sought are granted. It would be an exercise in futility to proceed with a hearing only to find that the property in question does not even exist as they would have changed hand or disposed of. It does not cost anybody any harm if the property is preserved by way of an injunction. To that extent prayer 3 is allowed.

9. Having made the above finding, the application dated 16<sup>th</sup> December 2014 is allowed with orders as follows:-

**(a) That the applicant be and is hereby granted leave to amend originating summons instituting this suit dated 18<sup>th</sup> December 2007.**

**(b) That the amended originating summons supported by an affidavit be and is hereby deemed as duly filed upon payment of the requisite filing fees.**

**(c) That an injunction do issue against the respondent herein barring him, his agents and or assigns from interfering with any of the property subject of this suit pending hearing and determination of the suit.**

**(d) That the amended originating summons be served upon the respondent within 14 days from the date of delivery of this ruling**

**(e) Costs in the cause.**

**SIGNED, DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF MARCH 2018.**

**J.N. ONYIEGO (JUDGE)**

In the presence of:

.....Counsel for the applicant

.....Counsel for the respondent

Edwin.....Court Administrator