



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 10 OF 2015

IN THE MATTER OF THE ESTATE OF THE MATRIMONIAL PROPERTY ACT, 2013

AND

IN THE MATTER OF LAND REGISTRATION ACT, 2012

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTIES

NCK.....APPLICANT

VERSUS

DKK.....RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY

RULING

1. The Interested Party herein filed this Notice of Preliminary objection dated 21st March 2018 against the Originating summons dated 5th March, 2015 as well as the Application dated 4.8.2016 on the following grounds;

(i) THAT this Court has heard and determined the single issue between the applicant and Interested party namely; whether the Applicant can lawfully object to the attachment and sale of the 1st Respondent properties in Execution of a decree of this Court on the grounds of spousal interest.

(ii) THAT the suit by the Applicant is a patent attempt to challenge the ruling delivered by Justice J. K. Serگون on 18.12.2014 in HCCC No. 316 of 2015 in complete abuse of this Court's process.

(iii) THAT the single issue between the Applicant and the Interested Party was directly or substantially in issue in the Applicant's objection proceedings filed in HCCC No. 316 of 2015 and therefore res judicata within the meaning of 7 of the Civil Procedure Act.

(iv) THAT the suit does not disclose any cause of action against the interested party.

(v) THAT in its orders made on 26th March, 2017, this Court observed that it has no jurisdiction to issue orders of stay of attachment of the interested Party's properties with the exception of the matrimonial home. These orders have not been reviewed or otherwise set aside and in that regard, this court is functus officio.

(vi) THAT the entire suit is an abuse of the Court process.

2. The parties were directed to file written submissions in the Preliminary Objection. The interested party has stated in his submissions that the Applicant herein, NK has moved this Court by the originating Summons dated 5/3/2015 and the application dated 4.8.2016 seeking a declaration that she owns an undefined proportion of listed properties registered in the name of her husband, DKK (the Respondent herein) by virtue of her marriage to the Respondent and her contribution during the subsistence of the marriage.

3. The Applicant in her application dated 4.8.2016 is seeking to restrain the interested party from attaching and selling the subject properties pursuant to a decree against the Respondent in HCCC No. 316 of 2010. The interested party submitted that the Applicant had raised the

issues before this Court and in a Ruling delivered on 26.3.2015 this court declined to issue any stay of attachment and further that this court is functus officio as the ruling of 26.3.2015 has not been appealed against.

4. The Interested Party also submitted that the single issue between the Applicant herein and the Interested party is res judicata as it was directly and substantially in issue between HCCC No. 316 of 2010 where the Court found that the Execution of a Court decree cannot be fettered or in any way constrained by a claim for application for determination of spousal contribution under section 17 of the Matrimonial Properties Act 2013.

5. I have considered the submissions filed in the Notice of Preliminary Objection. In the case of MUKISA BISCUITS MANUFACTURING CO. LTD -V- WEST END DISTRIBUTORS LIMITED (1969) EA. 696, SIR CHARLES NEWBOLD P observed as follows:-

“ The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.”

6. I find that the issues raised by the Interested party require to be ventilated in evidence. The Applicant requires a chance to establish if she has an interest in the properties which the interested party seeks to attach. The solution to this issue is to expedite the hearing of this case.

7. The preliminary objection is accordingly dismissed with no orders as to costs. The case to proceed within 45 days of this date.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 19TH

DAY OF DECEMBER, 2018

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI