



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PROBATE AND ADMINISTRATION DIVISION
CIVIL SUIT NO. 54 OF 2014 (O.S.)
IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

R M M.....PLAINTIFF

-versus-

J W M.....DEFENDANT

R U L I N G

1. By a Chamber Summons dated 12th May, 2015 and brought pursuant to **Order 37** of the **Civil Procedure Act Cap 21 Laws of Kenya under rules 16 and 17** of the **Civil Procedure Rules 2010**, R M M hereinafter referred to as the Plaintiff, sought the following orders from the court:-

- (i) Directions in terms of the procedure to be adopted at the hearing of this suit;
- (ii) Analysis of the sufficiency and admissibility of the documents on record;
- (iii) A declaration that *[particulars withheld]*, a company wholly owned by the Plaintiff and Defendant in the ratio of 9:1 is a matrimonial property, to be disposed of as a preliminary issue before full hearing of this dispute; and
- (iv) Any other further direction that the court may be pleased to give.

2. The application was based upon the supporting affidavit of the Plaintiff/Applicant and the grounds on the face thereof. I am of the view that on the first limb of the application, the parties should elect how they wish to proceed in their application and seek orders of the court giving the appropriate directions at the opportune moment. The second limb of the application ought to and shall be considered within the main application.

This ruling majorly therefore, concerns the third limb of the application.

3. The background of this application is that *[particulars withheld]*, the company which is at the heart of the dispute, was initially registered as a business name on 21st January 1983, with the Plaintiff as the sole proprietor. When the Plaintiff and the Defendant later got married in 1990, they worked together under the Umbrella of *[particulars withheld]*, both as a business name and later as a Limited liability Company. The income from this business is what was used to acquire jointly, several properties under the spouses' names.

4. [particulars withheld], Company (hereinafter referred to as the Company) was registered on 26th May 2008 during the subsistence of the Plaintiff's and Defendant's marriage. The marriage between the Plaintiff dissolved pursuant to a judgment delivered on 13th February 2015 in **Milimani RMCC Divorce Cause No. 348 of 2014, R M M -vs- J W M**. By its memorandum and Articles of Association the share capital of the Company was declared to be 1000 ordinary shares of Kshs.100/= per share.

5. Out of the 1000 ordinary shares, 900 shares were allotted to the Plaintiff while the Defendant herein was allotted 100 shares. Later on 29th April 2014 by a special resolution and instruments filed at the Companies registry, the Plaintiff /Applicant transferred (1) one share to one K M M. A civil suit is pending before the Milimani Commercial Court to determine the legality of the transfer of the share, being **Milimani HCC No. 394 of 2014, J W M vs R M M and 2 others**.

6. The Plaintiff/Applicant and the Defendant here worked together as Directors in the Management of the Company and both signed the Company's cheque and contracts. The Defendant has demonstrated injection of the business money from her company, [particulars withheld], to the Company to enable it service its obligations. None of these shares allotted to the Plaintiff and the Defendant have been paid for and the share certificates issued.

7. It is from the imputed facts above that the Plaintiff/Applicant contends that the Company, be declared as not a matrimonial property, as a preliminary issue before full hearing of the contested issue (s) in the main application. The Plaintiff/Applicant avers that he formed the said company before he and the Defendant got married. It is his submission therefore that this honourable court dispose the company as not a matrimonial property as a preliminary issue before full hearing of the contested issue (s) in the main application.

8. The application is opposed. Counsel for the Defendant in the replying affidavit thereto, contended that the said Company was formed for the purpose of benefiting the family. It was further submitted by the counsel for the Defendant that the Plaintiff had misconstrued the issue, and that the said company ought not to be deemed as matrimonial property, rather that it is the shares of the said company which ought to be deemed as matrimonial property.

9. The issue for determination is whether company under dispute can be summarily adjudged as not being included in the matrimonial property, as a preliminary issue before the full hearing of the main application.

10. I have considered the pleadings and the rival arguments from both parties together with the relevant case law on the issue before me. Case law has crystallized the parameters within which the relief of summary adjudication can either be granted or withheld. In sum, where there are triable issues raised in an application for summary judgment, there is no room for discretion and the court must grant leave for the application to be defended unconditionally at the trial by the correspondent defendant. See case of **Osodo -vs- Barclays Bank International Limited, (1981) KLR 30**.

11. Ordinarily a court will not interfere with the defence for a preliminary application which is intended to dispose of any matter before a full trial of the, matter unless such defense is based on wrong facts for the defence thereof which do not raise bonafide points of law. See - the Court of Appeal in **General Stores -vs- Popco Distributors Limited (1987) 2 KAR 89**.

12. In the cause of **Nairobi Golf Hotels (Kenya) Limited Civil Appeal No.5 of 1997 (UR)**, the court observed that it is now trite law that in applications for summary adjudication, the duty is cast on the defendant to demonstrate that he should have leave to defend his suit to full trial. The said duty is however limited to showing prima facie, the existence of a bona fide triable issue or that he has an arguable case. On the other hand, it follows that a plaintiff who is able to show that a defence raised by a defendant is shallow or sham is entitled to summary adjudication.

13. The Plaintiff/Applicant's application for summary adjudication was strongly opposed by the Defendant/Respondent. I have considered the pleadings and the issues arising for determination in the

instant matter and find that the defence reveals contentious issues which cannot be disposed of by way of summary judgment. The purpose of proceedings in an application for summary adjudication is to enable a plaintiff to obtain a quick judgment, where there is plainly no defence to the claim.

14. Where bonafide triable issues exist, parties must be allowed to contest those issues without condition. See - **Civil Appeal No. 33 of 1977, B. Qupta -vs- Continental Builders Limited** where Madan J A as he then was, stated that if a defendant is able to raise a prima facie triable issue, he is entitled in law to defend the suit to a full trial afforded fair hearing.

15. The dicta in **Commercial Advertising and General Agencies Ltd -vs- Qureishi (1985) KLR 458** was that on an application for summary judgment, the plaint, defence, counterclaim and reply to defence, if any, affidavits in support and in reply as well as relevant issues and circumstances are all proper material for consideration.

16. The defence in the Chamber Summons's application dated 12th May 2015 raises issues germane to making a determination as to whether or not the Company was a business formed to benefit the family. This is a pertinent issue which must be evaluated and considered in light of the **Matrimonial Property Act No. 5 of 2014** and the **Companies Act No. 17 of 2015** to resolve the dispute.

17. In her defence the Defendant/Respondent makes allegations of fraudulent transfer of shares of the Company which is contested. The court must determine whether there was fraud and if so, what the legal effect of the said fraud would be on the respective claims, as well as the consequences of the failure to plead particulars of the said fraud. It must be remembered that whether there is any evidence to support an allegation of fraud is a question of fact.

18. In light of the provisions of **Order 36** of the **Civil Procedure Act Cap 21 Laws of Kenya**, I find that the issues raised by the Defendant in her defence cannot be determined by way of summary procedure as has been sought in the third prayer of this Chamber Summons application.

19. Consequently the Plaintiff's application for summary procedure is found to have no merit and is therefore dismissed.

Costs shall be in the cause.

SIGNED DATED and DELIVERED in open court this **2nd** day of **August 2016**.

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L. A. ACHODE

JUDGE