



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 64 OF 2013 (O.S.)

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

AND

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT (1882)

C M C.....APPLICANT/PLAINTIFF

VERSUS

A N M.....DEFENDANT/RESPONDENT

RULING

1. The suit herein commenced on 14th October 2013 by way of Originating Summons dated 9th October 2013. The applicant seeks that the assets listed in prayer 1 of the Originating Summons be declared to have been acquired and developed by the joint funds and efforts of the parties hereto during marriage, and that the respondent holds them in trust for the applicant. There is also a prayer for a declaration that 50% or such higher proportion of the properties is held by the respondent in trust and for the beneficial interest of the applicant. She also seeks injunctive orders.
2. The grounds upon which the orders are sought are set out on the face of the application and in the affidavit sworn on 9th October 2013 by the applicant.
3. The parties herein got married in 1986 under Kikuyu customary law. They were blessed with seven (7) children. The parties are currently living part on account of irreconcilable differences that have arisen in the marriage. The applicant alleges that the property listed in prayer 1 of the Originating Summons and paragraph 5 of her affidavit was acquired and developed during the course of the marriage, although it was eventually registered in the name of the respondent. The applicant avers that she contributed to the acquisition and development of the assets both directly and indirectly. There are other assets, set out in paragraph 6 of her affidavit, which she says were acquired by the respondent before the marriage.
4. In paragraphs 7 to 22, the applicant gives details of how the assets were acquired. She states the names of the persons from whom they were purchased the sale price and the source of the money for the purchase thereof. She has also detailed how she contributed to the development of the assets. She explains that the property was registered in the name of the respondent as she had naively trusted him. She further states that she is a shareholder with the respondent in three named limited liability companies. The companies operate businesses from some of the properties the subject of the application before me, while some own some of the properties.

5. The applicant states that she has come to court because the respondent has recently started conducting himself in a manner that suggests that her interests in the assets are not secure. He has caused a lawyer to sue her for injunctions to bar her from interfering with the assets the subject of these proceedings.

7. Attached to the affidavit of 9th October 2013 are several documents. There are copies of the articles and memorandum of association of *[particulars withheld]* Petrol Limited, *[particulars withheld]* Stores Ltd and *[particulars withheld]* Beer Distributors Limited as evidence that the parties were shareholders in these companies. There are also copies of court papers in **Thika PMCCC No. 273 of 2013** between the parties as evidence that the applicant had been sued by the respondent in a case touching on the assets the subject of the instant application. The suit was struck out on 1st July 2013 for lack of jurisdiction. There are also notices to tenants instructing them to deposit rent on some account with the slip being delivered to the respondent.

8. A motion was filed simultaneously with the Originating Summons seeking temporary orders meant to remain in force pending the hearing and disposal of the Originating Summons. The main prayer is for an injunction to bar the respondent for wasting, damaging or alienating or interfering with the property listed in prayer 1 of the Originating Summons. There is also a prayer that rental proceeds from specified assets be deposited in a named account which is in the joint names of the parties.

9. The respondent replied to the application by way of an affidavit sworn on 21st November 2013. He states that prayers 2,3,4, and 5 of the motion are not tenable for they have been preceded by a property management contract between the respondent and a property management company. He alleges that he acquired the assets prior to marriage and they are therefore registered in his name. He avers that the parties are living separately or account of the applicant's cruelty.

10. Attached to the respondent's affidavit are several documents. There is a copy of the property management contract allegedly executed on 20th May 2013 between the respondent and a property management company on the management of some of the assets. There is a charge sheet which evidences that the applicant has been sued in a criminal court for assault causing actual bodily harm to the respondent. There is also a P3 form, duly filed, where the respondent is the complainant and it is indicated that he was assaulted by his wife.

11. There is a further affidavit sworn on 24th July 2014 by the respondent. This affidavit was filed in court on 25th July 2014. It was filed without leave and long after the applicant had filed her written submissions on 10th July 2014. There is no evidence that the applicant was served with the said affidavit and given a chance to respond to the fundamental allegations made in the said affidavit. It would not do justice to the case to consider this affidavit and I shall decide the application without any regard to it.

12. It was directed that on 26th June 2014 that the application be disposed of by way of written submissions. The applicant's submissions are dated 9th July 2014 and were filed in court on 10th July 2014. The respondent's submissions are dated 24th July 2014 and were filed in court on 28th July 2014.

13. In cases relating to distribution of matrimonial property, there are three key issues for determination. The first is whether the parties were in matrimony at the material time. The second one is whether during matrimony any assets were acquired and developed. The third is whether the applicant contributed to the acquisition and development of the said assets. Finally, if it is found the applicant did contribute to such acquisition and development, how should the property be divided or shared out between the parties. Before these questions are answered, the court must take evidence.

14. The applicant is asking me to preserve the assets the subject of the application pending the hearing and determination of the suit. The preservatory orders should be made on the basis of the principles set out in the decision of *Giella –vs- Casmann Brown* (1973) EA 358.

15. It is not in dispute that the parties are married. What is disputed is whether and which property was acquired during matrimony, and whether the applicant contributed to any such acquisitions. The

respondent denies that the assets enumerated in the application were acquired during matrimony, and denies that the applicant participated in any way in the acquisition. I note however that these denials are general in nature. The respondent does not go into specifics, as to which assets were acquired and at what time.

16. It is however not disputed that the assets listed in the application belong to the applicant. I am inclined, on account of dearth of information from the respondent as to when the property was acquired, to entertain the notion that the same could have been acquired during matrimony. I am mindful though that this is matter really for determination at the full hearing. I will however not venture into the question of whether there was contribution by the applicant. It will suffice for me to hold that there should be preservation of the said assets pending hearing and determination of the suit, for the court should not act in vain, in the event it finds in favour of the applicant only to establish that the assets were disposed of during the pendency of the suit.

17. I note from the material before me that some of the assets are registered in the names of limited liability companies. The specific assets in this respect are LR No. *[particulars withheld]*, LR No. *[particulars withheld]* and Ngenda/Githunguchu/*[particulars withheld]*. A court dividing property between parties would ideally be interested only in the shares owned by the parties in such limited liability companies not the assets owned by the companies. There are of course exceptional circumstances. It has not been demonstrated that there are such circumstances in the current case.

18. I am satisfied that the applicant is entitled to preservatory orders. The orders I am disposed to make in the circumstances are as follows:-

- a. That the respondent is hereby restrained, (whether by himself, his servants and/or agents) from wasting, damaging or alienating the properties listed below, pending the hearing and disposal of the suit herein, namely:-
 - i. LR No. *[particulars withheld]*
 - ii. LR No. *[particulars withheld]*
 - iii. LR. No. *[particulars withheld]*
 - iv. LR No. *[particulars withheld]*
 - v. LR No. *[particulars withheld]*
 - vi. LR No. *[particulars withheld]*
 - vii. LR No. *[particulars withheld]*
 - viii. LR No. *[particulars withheld]*
 - ix. LR. No. *[particulars withheld]*
 - x. LR No. *[particulars withheld]*
- b. That the costs of this application shall abide the outcome of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 30th DAY OF January 2015.

W. MUSYOKA

JUDGE