

REPUBLIC REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 16 OF 2007(OS)

IN THE MATTER OF MARRIED WOMEN PROPERTY ACT OF 1887

N W WPETITIONER

-VS-

S W G.....RESPONDENT

RULING

1. The petitioner and respondent cohabited as man and wife in 1986 and were blessed with 4 children. On 28th March 2007 the petitioner sought declaration of moveable and immoveable properties claimed to be matrimonial property and which were acquired during their marriage all which were registered in the names of the respondent to be declared jointly owned by the parties and urged the court to sell of the same and share the proceeds equally among them. This was followed by numerous applications and this prompted the current application dated the 12th July 2014 brought by the respondent seeking for the following orders;

That the suit be dismissed for want of prosecution and cost of the application be provided for.

2. The application was opposed and the petitioner respondent deponed that her advocate had on various occasions invited the respondent/applicant's advocate to fix the matter for hearing but their efforts had not borne any fruits and annexed the said invitation letters sent to the respondent/applicant. She gave a brief background of the matter that the petitioner was served with the said application and she filed a replying affidavit dated 12th July 2014. The matter came for inter partes hearing on 18th September 2014 but the same was adjourned and the parties were directed to file written submissions. That the petitioner has made several attempts to set down the matter for hearing but the same has not borne any fruits. On diverse dates the petitioner's advocates invited the respondents' advocates to fix a date for hearing of this matter by which was either informed he diary was full, the court file was missing or the other party's clerk did not attend. It was her submission that the application was brought in bad faith as he was well aware of the efforts made by the applicant to fix the matter for hearing.
3. She submitted that the Respondent/applicant had neglected to take up his responsibilities in total contempt of a valid court order and has attached the petitioner's salary to pay costs and that it was only fair and just for her to be allowed to prosecute her suit to its logical conclusion and as such the Respondent's/applicant's application should be dismissed. That the respondent's application is frivolous, vexatious and an abuse of the court process and he should be condemned to pay costs.
4. She referred the court to **Article 48** and **Section 1A and 1B** of the Civil Procedure Act. She relied on the case of *Joyce Kilonzo –vs- Bernard Kilonzo Katiku, Civil case no. 460 of 1998*, where it was held that, “ the suit herein has been relatively active over many years that it has been pending for hearing in the years 2002, 2003, 2004, 2005, 2008, 2009, 2010 and 2011. It is therefore not a suitable case for dismissal for want of prosecution.

5. The respondent/applicant on his part submitted that the submissions by the applicant were irrelevant in that they had tried time and again to fix the matter for hearing but the file could not be traced this he argues this is a lie and fabrication by the petitioner/respondent to attract sympathy from the court as there is no prove that no action had taken place since 2009 and the respondent/applicant continues to be saddled with a case while the petitioner is not bothered to execute.

6. From the respondents annexures there is the invitation letters dated 5th June 2009, 17th February 2012, 17th April 2012, and 17th September 2013. The same appear to have been served on the respondents as they are stamped with their firm stamp and the applicant has not refuted that the same were served on them. He only refutes that the same were never presented to the court registry. Only the invitation dated 17th April 2004 bears the registry stamp. All in all having considered the affidavits and submission filed, i find that the respondent has demonstrated that she has had made attempts to set this matter down for hearing. On the other invitation letters I will give the petitioner/respondent the benefit of doubt. In the interest of justice I will not dismiss this suit but to avoid further delay in this matter I direct that the parties will make the necessary arrangements to fix this matter for hearing within the next **45 days**. The said court file is available any challenges encountered by the parties to be raised with the Deputy Registrar in the Family division. It is so ordered.

Dated, signed and delivered this **30th** day of ***April*** 2015.

R. E. OUGO

JUDGE

In the presence of:-

.....**For the Applicant**
Respondent

.....**For the**

.....**Court Clerk**