



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT NO. 24 OF 2013 (OS)
IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY
AND
IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT (1882)
P.N.....APPLICANT
VERSUS
J.N.....RESPONDENT
RULING

1. There are two applications before this court for determination. The first in time is a Notice of Motion dated 3rd July, 2013 and taken out under Order 2 Rule 15 of the Civil Procedure (Revised) Rules 2010 and all the enabling provisions of the law. The Applicant seeks Orders that this court be pleased to strike out the Plaintiff's suit against the Defendant as it discloses no cause of action. The second application is a Notice of Motion dated 25th July, 2013 and taken under *Section 1A, 1B, 3A & 80* of the Civil Procedure Act & Order 45 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The Applicant thereby seeks orders that the Honourable Court be pleased to review and or vary its orders given by Kimaru J. on 14th May, 2013 in respect of property known as Plot No. *[particulars withheld]* Map Embakasi Ranching.

2. The application dated 3rd July, 2013 is premised on the grounds that; the Originating Summons has not disclosed any reasonable cause of action against the Defendant; there is no divorce or suit for judicial separation pending and that it is otherwise an abuse of the process of the court.

3. This application is against the background of the Originating Summons application dated 8th May, 2013 by the Respondent/Applicant herein. In the said application, the Respondent/Applicant sought for the division of matrimonial property Plot No. *[particulars withheld]* Map Embakasi Ranching acquired during the subsistence of the marriage. The Applicant and the Respondent got married under Kikuyu customary law in 1987. It has been noted that the respondent/Applicant also sought for restraining orders under the Notice of Motion application dated 8th May, 2013 restraining the Applicant/Respondent herein from dealing with the said property until a determination on the same is made, which orders were obtained ex-parte on 14th May, 2013.

4. The application was prosecuted by way of written submissions. It is the Applicant's position that the

Honourable Court had no jurisdiction under Section 17 of the Married Women's Property Act (1882) to undertake proceedings and make decisions regarding properties of the married couples during their unbroken covertures. Further, that the Applicant and the Respondent got married under the Kikuyu customary law, a potentially polygamous marriage which does not bar the Applicant/Respondent from engaging into another marriage. The Applicant contends that there is no divorce or suit for judicial separation ever filed and pending in any Court of law and neither is there any termination of the said marriage under the Kikuyu customary practices and therefore leaving the Court with no jurisdiction to alternate properties of the couples.

5. The Applicant relied on this court's decision in *RMG vs. NG Interested Party, SP Limited & M D Limited* [2013] eKLR where it was observed that "...*The High Court has no jurisdiction to alienate lands between spouses during their lifetime or unbroken coverture...*" He submits that the Respondent/Applicant's application is an abuse of the process of the court and should be struck out with costs.

6. On her part, the Respondent/Applicant submits that the said application is not supported by any affidavit evidence or justifications of the orders sought save for evidence produced at the bar by the Advocate for the Respondent. It is her position that in her reply to the application, she justified that she was married to the Respondent and during the existence of the marriage, property was acquired which she contributed to and that the marriage has now fallen apart and each party living separately with the Respondent establishing another family.

7. On dismissing a suit for none disclosure for a cause of action, she cited the decision in *DT Dobie Co. Ltd vs. Joseph Muchina and another* (1982)eKLR where it was held that:-

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment...a court of justice ought not act in darkness without the full facts of a case before it".

8. The Respondent/Applicant urged this court to consider the above-cited authority in recognizing that the suit herein raises a cause of action which is that the parties herein have dissolved their marriage under customary law and they are living separate with the Respondent. It is her submission, that in *RMG vs. NG Interested Party S P Limited & M D Limited* (Supra), the court recognized that where the parties were separated, then the coverture was broken and that either party has a right to file for division of the matrimonial property.

9. The Civil Procedure Rules provide under Order 2 Rule 15 (1) (a) (d) that where a pleading discloses no reasonable cause of action or defence, and where it is an abuse of court process, it will be ordered to be struck out or amended. Nonetheless, the procedure under this provision is only applicable to cases:

- a. which are plain and obvious,
- b. where the case is clear beyond doubt,
- c. where the cause of action or defence is on the face of it obviously unsustainable, or
- d. Where the case is unarguable.

10. It is important to note that the court has inherent jurisdiction to strike out pleadings and other documents which are shown to be frivolous, vexatious, or scandalous, and to stay or dismiss an action or to strike out a defence which is an abuse of the process of the court. However, this jurisdiction must be exercised with great circumspection and only where it is perfectly clear that the plea cannot succeed, and that it ought to be exercised sparingly and only in exceptional cases.

11. Would this court say with certainty that the said Originating Summons dated 8th May, 2013 is plain

and obvious? That it is clear beyond doubt? That it is obviously unsustainable? Absolutely not. I am not persuaded by the Applicant/Respondent's argument, and do not accept that the said application discloses no reasonable cause of action. Some of the allegations raised in the suit call for the cross-examination of the parties which can only be done if the matter proceeds to full trial. The Applicant/Respondent contends that the marriage still subsists, while according to the Respondent/Applicant the parties herein have been separated customarily since 2012 and divorced under the same rites. Consequently, the application raises serious triable issues. It is imperative to note that striking out of pleading is a drastic measure and there must always exist good reasons for doing so.

12. In ***DT Dobie vs. Muchina [1980] KLR 1***, the Court of Appeal expressed itself *inter alia* as follows:

“Reasonable cause of action’ means a cause of action with some chance of success when (as required by paragraph 2 of the Order 6 rule 1) only the allegations in the plaint are considered. A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint...A pleading will not be struck out unless it is demurrable and something worse than demurrable and the rule is only acted upon in plain and obvious cases and the jurisdiction should be exercised with extreme caution. The Court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments and must not dismiss an action merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved...It is not the practice in civil administration of the Courts to have preliminary hearing as in crime. If it involves parties in the trial of the action by affidavits it is not a plain and obvious case on its face...The summary jurisdiction is not intended to be exercised by minute and a protracted examination of the documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial Judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to be an abuse of the inherent power of the Court and not a proper exercise of that power...Whereas no evidence is permitted in the case of Order 6 rule 13(1)(a), it is permitted in the case where there is an allegation that it is an abuse of the Court process...A Court of justice should aim at sustaining a suit rather than terminating it by summary dismissal...If a suit shows a mere semblance of a cause of action, provided that it can be injected with real life by amendment, it ought to go forward to hearing for a Court of justice ought not act in darkness without the full facts before it.”

13. This court has carefully looked at the said Originating Summons application dated 8th May, 2013 filed herein, and is reluctant to accept the Applicant/Respondent's contention that it does not disclose reasonable cause of action. There is no good reason for striking out the said application. It is the considered view of this court that justice demands that the said suit is sustained rather than struck out at this stage. It therefore follows that the application for striking out must fail.

14. The application dated 25th July, 2013 is predicated on the grounds on the face of the application. It is further supported by the annexed affidavit of J.N.N on even date. The said supporting affidavit has reiterated the grounds in the application.

15. The application is opposed by way of a Replying Affidavit sworn by P.N, the Respondent/Applicant herein on 12th August, 2013. She avers that the Respondent did not secure the said property solely through a cooperative loan but also through her assistance. That she moved with the children into the incomplete house which they currently reside, because the Respondent chased her and the children out of the matrimonial home. She avers that she made major improvements in the house to make it habitable. That she is unable to provide electricity as the Respondent is in possession of documents required for installation of electricity as required by Kenya Power. She contends that she cannot provide a drainage system as alleged in the letter from the Council as Ruai has no drainage system provided by the County Council. It is further her averment that at no point has the said Dr. F.M Gachanja or anyone from the Department of Public Health ever come to her house to survey or serve any document and thus the said report is a malicious action by the Respondent to have her and the children evicted from the house. She contends that no County Council by-laws have been broken as alleged since the letter has failed to

identify the particular laws that have been breached and no inspection of the house was done to verify the same. She avers that the Respondent got the letter from the County council on 10th May, 2013 once he had been served with the court documents which coincidentally do not add up unless the respondent organized for the letter to coincide with the date of service of the court documents. That the Application herein as made only shows that the Respondent has intention to interfere with the suit property as the orders in place have stopped him from doing so.

16. The parties herein filed in their written submissions. In his submission, the Applicant/Respondent denies all the Respondent/Applicant's allegation of improving the house in question, and that it is clear from her exhibit -1 pictures of the house that the same are not done to proper finish as required by the Public Health Act. The Applicant/Respondent further submits that the Respondent/Applicant denied him access to the premises to finalize construction in line with the approved plans, and as such abused the court order issued on 14th May, 2013. He contends that he is being distressed by renting a residential house where he lives with his children having been barred from finishing the construction of the suit property. Further, that the Affidavit of the Respondent/Applicant is full of contradictions which clearly show that she moved to court to intentionally frustrate the Applicant/Respondent in completing construction of the suit property in order to lodge prematurely a claim of the suit property.

17. On her part, the Respondent/Applicant submits that the Applicant/Respondent was fully aware of the existence of the said letter from the Public Health department having received the same on the 10th May, 2013 while the restraining orders by Justice Kimaru having been issued on 14th May, 2013 and thus cannot be considered in the instant application as new evidence to qualify the Respondent for an order of review as the same has been in the Respondent's knowledge and has been produced in court as a supporting document in favour of his case.

18. The Respondent/Applicant cited the case of *James M. Kingaru and Others vs. J.M Kangari and Muhu Holdings and Others* (2005) eKLR, where Visram J stated that “...in order to obtain a review the applicant must show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made...the applicant must show that he could not have produced the evidence in spite of due diligence, that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of the trial.”

19. The Respondent/Applicant further relied on the decision of Sergon J, in *Gunter Josef Ritsechel vs. Gisela Geb Jungen Bork and another*, HCCC No. 215 Of 2000 (unreported), where he held that: “It is clear that the Plaintiff did not act with due diligence in having the above issue raised. In the circumstance, I do not think the decree should be reviewed. There was evidence all along...”

20. It is thus the Respondent/Applicant's submission that the Applicant/Respondent failed to exercise due diligence in ensuring that the document was before the court on 14th May, 2013 when the matter came up for *inter partes* hearing.

21. Having carefully considered the application, the affidavits on record and the rival submissions by the parties, I form the view that the only issue for determination is whether the application for review of the said order is merited.

22. Order 45 Rule 1(a) and (b) of the Civil Procedure Rules under which this application is taken provides thus:

a. “1. (1) any person considering himself aggrieved—

a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. By a decree or order from which no appeal is hereby allowed,

c. and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

23. From the foregoing, it is clear that there are limitations upon which an application for review are to be set out and they are that there should be discovery of new and important evidence, an error apparent on the face of the record or for any other sufficient reason. It further states that the application for a review be made without unreasonable delay.

24. It is important to note at this earliest stage, that it is absolutely important for this court to remain conscious of the above stated rationale in a review application. I note that the said order of temporary injunction restraining the Applicant/Respondent herein, his servants and/or agents from alienating, wasting, damaging and/or otherwise interfering with the suit premises pending the hearing and determination of the Originating Summons dated 8th May, 2013, was made on 14th May, 2013. The present application was filed in court on 25th July, 2013. It is therefore my considered view that the said application being made after almost two months was timeous and therefore made without undue delay.

25. Be that as it may, this court does not think that the Applicant/Respondent's application satisfied it that there is a discovery of a new and important matter or evidence which after exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or made on an account of some mistake or error apparent on the face of the record or any other sufficient reason. Although, the said order by the learned Judge was made ex parte, the Applicant/Respondent was aware of the hearing and indeed entered appearance but chose not to attend, neither filed his reply. The Applicant/Respondent's basis for the instant application was the said notice from the County Government of Nairobi to him indicating that the said property was incomplete and is inhabitable in accordance with the Public Health Act. He states at paragraph 9 of his supporting affidavit that the said notice was served upon him on 10th May, 2013. I note that this fact being in existence on the date of the hearing forms the basis of an application for review. But I am not persuaded that the Applicant/Respondent could not reasonably have presented the same. By its nature, an application for review assumes that the Court will review a case as it should have been constituted at the original hearing had it not been for the particular circumstances that prevented a party from presenting the new facts or evidence. The Applicant/Respondent entered appearance when served with the said Originating Summons, but for reasons only known to him failed to attend the hearing on the said date. In the circumstances, this court has no reason to intervene and disturb the order made on 14th May, 2013 by Justice L. Kimaru, as the Applicant/Respondent has failed to satisfy the provisions of Order 45 of the Civil Procedure Rules cited above. I do not see any evidence on the file that convinces me that the Applicant/Respondent has made discovery of new and important matter or evidence. Neither is there any sufficient reason provided.

26. For all the above reasons, the court makes the following order: The application for a review of the decision rendered on 14th May, 2013 by Kimaru J. is dismissed.

DATED, SIGNED and DELIVERED at NAIROBI this 20th DAY OF June 2014.

W. MUSYOKA

JUDGE

In the presence of Mr. Kamencu for Mrs. Muhandi advocate for the applicant.