

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCCC 6 OF 2010 (OS)

L W M.....APPLICANT

VERSUS

J N K.....RESPONDENT

RULING

1. The parties argued before me an application they purported to be dated 26th April 2012. There is no such application on record. I suppose that the application they argued is the one dated 26th May 2012 but filed in court on 26th April 2012.

2. The said application seeks stay of proceedings in this matter pending hearing and determination of an appeal allegedly filed in court on 16th April 2012. The said appeal arose from a decision of I. Obulutsa, Senior Principal Magistrate, in Nairobi Divorce Cause Number 42 of 2016. The outcome of the appeal is said to be critical to the outcome of the current proceedings.

3. The said application is opposed by the respondent. She has filed grounds of opposition and a replying affidavit. It is pleaded that the said application is frivolous and an abuse of the court process, it is bad in law and the court lacks jurisdiction to hear and determine it. It is argued that the court cannot entertain a matter which is substantially in issue before another court. It is further argued that the orders sought in this matter ought to have been sought in the appeal.

4. Counsel for the parties argued that the application before me on 6th June 2013. It was the applicant's case that a divorce had been granted by the lower court, yet their contention was that there was no marriage between the parties. It is this point that the applicant seeks to address on appeal. The applicant argues that the divorce case has a bearing on the distribution of the property the subject of this suit, for the appellate court is due to determine the question as to whether the parties in this cause were actually married to warrant division of matrimonial property.

5. In reply, counsel for the respondent argued that the appeal referred to by the appellant related to divorce proceedings and not division of matrimonial property. The civil appeal is premised on the Matrimonial Causes Act, while the current suit is founded on the Married Women's Property Act 1882 (now repealed). Her case therefore is that both suits are distinct. The filing of the two suits simultaneously is not relevant. In any event, the applicant did not seek stay of these proceedings to await the outcome of the divorce proceedings. Counsel contended that as of the date the application was being argued, the parties were divorced. It was further argued that the applicant has not established that his application falls for determination under Order 42 rule 6 of the Civil Procedure Rules by showing that the two cases are in fact one and the same.

6. The two suits in question touch on different issues. One is about dissolution of a marriage, while the other is about division of matrimonial property. The two suits are related in the sense that they involve the same parties and that the determination of the current suit turns on the question whether the relationship between the parties in both suits amounted to a marriage. Otherwise the two suits are distinct.

7. I agree with counsel for the respondent that as we stand today, the parties are divorced, the court trying the issue as to whether there was a marriage between the parties having come to the conclusion that there

was indeed a marriage which was capable of being dissolved. Although there is an appeal on that point, the appeal has not been determined, and therefore that decision holds.

8. Consequently, I do hereby find that a case has not been made out for stay of proceedings herein pending the hearing and determination of the appeal against the dissolution of the marriage between the parties.

9. The application dated 26th May 2012 is hereby dismissed, with costs to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 26th DAY OF September, 2014.

W. MUSYOKA

JUDGE

In the presence of Mrs. Thongori for Mrs. Wambugu advocate for the applicant.