



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCC NO. 72 OF 2013

J N.....APPLICANT

VERSUS

P M.....RESPONDENT

RULING

1. The plaintiff moved the court on 14th November 2013 by way of an Originating Summons dated 13th November 2013 seeking various declarations on specified assets that were allegedly acquired during her marriage to the defendant. The said assets are said to be in the hands of the defendant and the plaintiff would like the court to declare that the defendant holds the same in trust for himself and the plaintiff.
2. Contemporaneously filed with the Originating Summons is a Motion dated 13th November 2013. Several prayers are sought in the said Motion - restraining orders to prevent the sale or disposal of the specified movable properties, an account for all the monies received through sale of stock in the business and from the hire of a roller machine, deposit of the receivable income in a joint account and in the alternative release of the roller machine to the plaintiff.
3. In the affidavit in support of the application, sworn on 13th November 2013, the plaintiff alleges to have had been married to the defendant under customary law since 1993, a marriage that was blessed with two children. There have been problems in the marriage and the parties are separated. They have been operating a hardware shop and leasing out a roller machine. The plaintiff avers that she ran the shop while the defendant managed the roller machine. She has since been alienated from the shop. She claims to have contributed to the buying of stock for the shop through a loan from Family Bank. She further states that the roller machine was imported in her name.
4. The plaintiff has attached several documents to her affidavit. Annexure A is copy of a letter by the defendant meant to evidence the disagreements between them. Annexure B is an inventory of the items or goods in the hardware shop. Annexure C is facility offer made to the plaintiff by a bank. Annexure D is an invoice from the sellers of the roller machine indicating that the same was imported in her name.
5. In reply to the application, the defendant swore an affidavit on 3rd December 2013. He concedes the marriage indicating that the same actually dated back to 1991. He avers that the plaintiff was not working when they met. He gave her funds to enroll for a course, but she did not. He invested in a shop for her but she ran it down, and idled her time away at her father's

shop. She turned to drunkenness and immorality, characterized by long periods away from the matrimonial home. She on occasion took the defendant's money without his consent and obtained bank loans without consulting the defendant, she would not pay the loans and the defendant would be forced to settle the same. To settle her down he registered a business, sold his property raise capital, leased premises and stocked the shop. He also took out loans to raise funds for stocking the shop. He further avers that he had to sell one of his lorries to raise money for the purchase of the roller machine. He states that although the roller came in her name she did not contribute a cent to its acquisition.

6. Attached to the defendant's affidavit are documents to advance his case. There is a certificate of registration of the hardware business, showing that the registration was in the name of the defendant. There is the lease document for the hardware shop, executed by the defendant with the landlord. There are also several sale agreements presented as evidence of the defendant's efforts to raise funds for the hardware business and the purchase of the roller machine.

7. The plaintiff responded to the defendant's affidavit vide her further affidavit sworn on 5th February 2014. She asserts that she did attend a computer school contrary to the allegations by the defendant, and attaches copies of documents to support her case. She denies the allegations of immorality and drunkenness. She states that she left the matrimonial home after the respondent had gone to live with another woman and when he came back, she confronted him about it whereupon he chased her out without the children. She explains that she got a loan with the Kenya Women Finance Trust and another from the Family Bank which she ploughed towards the businesses and the assets that are the subject of these proceedings.

8. It was directed on 3rd April 2014 that the application be disposed of by way of written submissions. The applicant filed her submissions on 5th May 2014. The respondent's submissions are not on record.

9. The parties have gone into great lengths to support their respective contentions that they had both contributed to the acquisition of the assets the subject of these proceedings. The determination of the respective contribution of either party is a matter for determination in the Originating Summons dated 13th November 2013. What is for determination at this stage is the motion dated 13th November 2013. I am not obliged in the determination of the Motion to venture into considering the question of the contribution of either party to the acquisition of the assets.

10. The parties have placed before me documents to buttress their various positions. From the material before me, I am disposed to order the preservation of the roller machine being Benford TV 1200 serial number SIBTV1200ERO5CF082 and of the household goods pending the hearing and determination of the suit.

11. On the preservation of the stock in the hardware shop, I do note that the shop operates under a business name registered in the name of the respondent. This could suggest that it a business belonging to the respondent. Whether the applicant contributed to the acquisition of the stock is a matter that is for determination at the main trial. I note that the same is a running business. I note too that the applicant is at the same time asking me to order that a joint bank account be opened to hold the sales of the same stock and for an account on the proceeds of the business. It is clear that the applicant expects that the business should continue to run, yet it cannot run when orders are granted with respect of the preservation of the assets. It would not be in the best interests of the parties that the business closes in order to achieve preservation of the assets.

12. There are prayers with respect to accounts, that is from the sales of the stock of the business and of the use of the roller machine. Both sides claim the assets. They both have

placed before me material to support their respective cases. The assets are now in the hands of the respondent. I cannot order division of the property at this stage as prayed. The said assets ideally should remain where they are, subject to being preserved. The said assets are income generating and therefore there is basis for the prayer for accounts in the interim.

13. The orders that I am disposed to make in the circumstances are:-

- (a) That the respondent shall retain possession of the roller machine and shall continue to hire it out, but he shall not sell it or in any other manner dispose of it pending the hearing and determination of the suit;
- (b) That the respondent shall continue to operate the hardware shop under *[particulars withheld]*;
- (c) That the respondent shall keep proper accounts with respect to the hire of the roller machine and the running of the hardware shop during the pendency of the suit, and shall lay before the court audited accounts thereof by the 20th day of December of every year; and
- (d) That there shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 21st DAY OF November 2014.

W. MUSYOKA

JUDGE

In the presence of Ms. Odembo advocate for the applicant.