



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO: 29 OF 2009 (O.S.) (AMENDED)
IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

AND

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

R M G.....APPLICANT/RESPONDENT

VERSUS

N G.....RESPONDENT/APPLICANT

S P LIMITED.....1ST INTERESTED PARTY

M D LIMITED.....2ND INTERESTED PARTY

RULING

The application for determination is dated 14th November 2012. It seeks that this suit be stayed pending the hearing and determination of **HCCC No. 719 of 2010**, pending at the Commercial Division of the High Court. It is also prayed in the alternative that this suit be dismissed or struck out. The other prayer is that the applicant/respondent be ordered to deposit security for costs of the suit, to be assessed based on the respondent/applicant's claim in **HCCC No. 719 of 2010**. The applicant in the Originating Summons is the wife of the respondent, who is the applicant in the Motion for stay. I shall refer to them as husband and wife.

The grounds upon which the application is predicated are set out on the face on the application. They are further elaborated in the affidavit in support of the application. The grounds include:-

- a. that the subject property, that is to say LR. No. (particulars withheld), is not matrimonial property and therefore it cannot form the subject of proceedings under Section 17 of the Married Women's Property Act, 1882;

- b. that the applicant in this cause is not a registered owner of the subject property and therefore she lacks the *locus standi* to sue over it;
- c. that there are no pending matrimonial proceedings between the applicant and the respondent, hence there is no jurisdiction upon which the court can entertain the suit for division of matrimonial property during coverture;
- d. that **HCCC No. 719 of 2010** is pending and is in respect of the same subject matter, this cause ought to be stayed to await the outcome of the said **HCCC No. 719 of 2010** to avoid the possibility of the courts arriving at conflicting decisions;
- e. That the claim of the applicant in this cause is intimately dependent on the outcome or conclusion of **HCCC No. 719 of 2010**.
- f. That the subject property is mortgaged to persons who are not parties to this cause and whose interests are likely to be adversely affected by a decision of the court in this cause.

After the wife was served with the Motion dated 14th November 2012, she filed a replying affidavit sworn on 22nd January 2013. The said affidavit presents a number of grounds or arguments to counter those advanced by the husband, these include:-

- a. that the suit property is matrimonial property although it is not registered in her name for she contributed to its acquisition, she had been in occupation of it and she has since extensively developed it;
- b. that the husband acted on his own behalf and on her behalf in the transaction wherein they acquired the asset from the sellers, a dispute arose between them and the sellers, and the sale transaction has not been finalized;
- c. that the husband, without consulting her, entered into a commercial arrangement with third parties for the development of the suit property, he has received a deposit as part consideration under the said commercial arrangement, with the balance being held in trust at the bank to await the outcome of this suit;
- d. that this cause was commenced by the wife out of her apprehension that she might lose her rights over the property asking the court to determine and safeguard her share;
- e. that the existence of the marriage or the non-existence of matrimonial proceedings is not a bar to the prosecution by the suit under **Section 17** of the Married Women's Property Act, 1882;
- f. That her entitlement to a share in the subject property is not dependent on the outcome or conclusion of **HCCC No. 719 of 2010**.

The application was argued orally on 19th February 2013. The application was opposed by Mrs. Thongori for the wife. She argued that the same had no basis as it seeks stay of proceedings that were already pending before **HCCC No. 719 of 2010** was filed. The instant suit was filed in 6th August 2009, while **HCCC No. 719 of 2010** was filed on 28th October 2010. The application, it was argued, was filed with intent to frustrate the hearing of the Originating Summons. It was submitted that the two matters deal with the same subject matter, that is to say the portion of LR No. (particulars withheld) the subject of sale agreement signed by the husband and Dr. S. G and Mrs. N. G, but there were aspects of the two suits which could be dealt with distinctly and separately. The other argument was that the matter was *res judicata* as the issues raised in the application dated 14th November 2012 were substantially the same issues raised in the Notice of Preliminary Objection dated 20th August 2009, to the application dated 5th August 2009. It was submitted that in disposing of the application dated 5th August 2009, Dulu J must have taken into account the matters raised in the Preliminary Objection dated 20th August 2009. The effect of that was to make the said issues *res judicata*, and the same cannot thereafter be the subject-matter of a subsequent application. To the argument by the husband that the property is leased to Equity Bank and therefore it cannot be the subject in matrimonial proceedings under **Section 17** of the Married Women's Property Act, 1882; Mrs. Thongori submitted that as at the time the counter claim in **HCCC No. 917 of 2010** was filed, the said property was still the subject of a charge. It was still charged when the husband consented to the leases being deposited in court. It would therefore be selective to use that argument to defeat the wife claim. She further submitted that properties may not always be clear, but the courts would still order their division subject to settlement of whatever indebtedness.

On the law, Mrs. Thongori submitted that under **Section 17** of the Married Women's Property Act, 1882, the action must be filed while the parties are still in coverture. The parties in this dispute were at the time of filing suit, and even at the time of argument of the application, in coverture. She cited *W.N vs. N.K* (2008) 1 KLR (G&F) 218, where Kwach JA stated, at page 221, that all a wife has to show is that she was married to the husband as at the time of the filing of the Originating Summons under Section 17 of the Married Women's Property Act, 1882. She referred too to *Njoroge vs. Ngari* (1985) KLR 480 where it was held that a declaration of beneficial ownership is not inconsistent with the provisions of land legislation. She submitted that the decision in *Peter Njenga vs. Sophia Ndungu* Nairobi Court of Appeal **Civil Appeal No. 2 of 2000** was distinguishable, as it dwelt on the refusal by a court to review a judgment.

Mr. Muriuki argued the case for the husband. He submitted that the fundamental issue in the application goes to the jurisdiction of the court to entertain the matters raised in the Originating Summons. He argued that the legal position is that during the subsistence of a marriage or coverture there cannot be a valid suit for division of matrimonial property for the court has no jurisdiction to alienate matrimonial property of couples who are at peace. He submitted that **Section 17** of the Married Women's Property Act, 1882, only applies to cases of breakdown in a marriage. It has to be demonstrated that there are separation or divorce proceedings or some other cause relating to the marriage, for it is in such situations that a party to a marriage may lose out, so far as matrimonial property is concerned, and therefore law comes in to protect the interests of such a spouse. He stated that it is for this reason that some provisions of the Married Women's Property Act, such as **Section 12**, which provides that no spouse shall be entitled to sue the other even for a tort, are in place. To buttress his argument, Mr. Muriuki cited *Peter Njenga vs. Sophia Ndungu* (supra), where it was held that where the parties are still married a court has no jurisdiction to alienate suit lands between them during their lifetime or unbroken coverture. He submitted that this was a decision of the Court of Appeal and it bound the High Court. He stated that he is yet to see a case where a suit for division of matrimonial property has been brought in a situation such as the instant one where the parties are still in unbroken coverture.

He referred to the judicial decisions cited by Mrs. Thongori and stated that all of them support his argument. In *WN vs. NK* (supra), the marriage had broken down, and the wife had sued for separation and maintenance. He submitted that this was a case of a cause for separation followed by an application for division of matrimonial property. The same applied to *Njoroge vs. Ngari* (supra), where the parties separated and a maintenance order was made. He submitted that in *M vs. M* (2008)1 KLR (G&F) 247, the court stated that the contribution of the parties to a marriage to acquisition of property during coverture is considered 'if the marriage breaks down,' and therefore **Section 17** of the Married Women's Property Act is not open-ended, it does not apply across the board.

On the timing of the application dated 14th November 2012, it was submitted that the husband was at liberty to bring it at any time. In any event the application was part of the prosecution of the suit. The application touched on the jurisdiction of the court and it could be raised at any stage of the proceedings. It does not touch on matters that are *res judicata* as the issue of jurisdiction did not arise previously in the proceedings, neither has the court had opportunity to adjudicate upon it. The preliminary objection dated 20th August 2009 was raised to the interlocutory application dated 5th August 2009, but not to the suit. It was submitted that the preliminary objection was never argued and Dulu J's decision on the interlocutory application did not turn on the issue of jurisdiction.

Mr. Onyango appeared for the interested parties, S Properties Ltd and M Developers Ltd. He stated that the interested parties supported the application by the husband.

The Originating Summons herein, dated 5th August 2009, was lodged in court on 6th August 2008 by the wife seeking:-

- a. A declaration relating to land that the husband was in the process of buying to the effect that the same was owned jointly by the two parties.
- b. An order that the 50% of the said land was held in trust by the husband for the wife.
- c. An order that the wife was entitled to 50% of the said property or the proceeds of sale of the same

- or of such other proportion as the court may deem fit.
- d. An injunction to restrain the husband from alienating the said property before the Originating Summons is heard and finally determined.

The said Originating Summons was amended on 8th October 2012, pursuant to an order of the court made on 1st October 2012. By this time two interested parties had been joined to the cause, being S Properties Ltd and M Developers Ltd.

While the Originating Summons was pending, M Developers Ltd filed a plaint dated 27th October 2010 at the Commercial Division of the High Court in **HCCC No. 719 of 2010** on 28th October 2010. This suit is against the persons, who are the parties to the Originating Summons dated 5th August 2009, that is to say N G and R M G. The principal order sought by Muga Developers Ltd is that the suit property LR No. (particulars withheld) belongs to the company and therefore the couple must be permanently restrained from having anything to do with the said property, and if they do anything with respect to it they would be guilty of trespass entitling the company to damages. It would appear from the pleadings that that suit, **HCCC No. 719 of 2010**, was prompted by the Originating Summons dated 5th August 2009. The company appeared to perceive at the time of filing suit that the couple was fighting over the company's property and there was a real possibility that they would move in and take possession. The plaint has been replied to by the husband and wife defendants.

There are two principal prayers in the application dated 14th November 2012 - (1) for stay of **HCCC No. 29 of 2009** (OS) or, in the alternative, dismissal of the said suit, and (2) security for costs to be furnished by the wife. For the purposes of this ruling, I will treat the matter as having three principal prayers – stay of suit, striking out or dismissal of the suit and security for costs.

Before I consider the three prayer, I will have to determine whether the application dated 14th November 2012 is *res judicata* on the ground that the matters the subject of the said application were also the subject of previous proceedings in the same matter, to wit – the Notice of Preliminary Objection dated 20th August 2009, raised in the application dated 5th August 2009. It was argued that in determining the application dated 5th August 2009, Dulu J, who was seized of the earlier application, must have taken the matters raised in the objection into account, and that being so the said matters are now *res judicata* and ought not to be raised again in a subsequent application.

Black's Law Dictionary, Ninth Edition, Thompson Reuters, St. Paul, 2009, page 1425, states that *res judicata* is Latin for 'thing adjudicated,' and it defines two things: -

- a. An issue that has been definitively settled by judicial decision; and
- b. An affirmative defence barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transactions and that could have been – but was not – raised in the first suit.

The Kenyan law on *res judicata* is **Section 7** of the Civil Procedure Act, which provides:-

'No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.'

From the wording of **Section 7** of the Civil Procedure Act, to my mind, the *res judicata* rule applies only to suits and it envisages existence of two suits, where a determination in a former suit has the effect of barring a later suit between the same parties founded on the same facts and cause of action. It was held in *Kanorero River Farm Ltd and 3 others vs. National Bank of Kenya Ltd* (2002) 2 KLR 207, that the

determination in the former suit applies to both a final and an interlocutory determination. The rule as stated in **Section 7** of the Civil Procedure Act does not apply to interlocutory decisions within a suit. The effect of this then is that there is no merit to the argument raised on behalf of the wife that the application before me is *res judicata* in view of an earlier interlocutory decision made in the same suit.

Even if the rule were to apply to interlocutory applications, I would hesitate to find that the husband is barred from raising the matters that he has raised in the instant application. In the first place, I am acting on a reconstructed file, the original court file having been misplaced, the ruling by Dulu J to the application dated 5th August 2009 is not on the available record. No effort was made by the parties to place a copy of the said decision before me, and I therefore I have no basis upon which to decide whether or not Dulu J took into account the arguments raised in the preliminary objection.

The law in Kenya on stay of suits is a little uncertain. It was previously provided for in Order XI of the old Civil Procedure Rules. Following the reorganization of the Civil Procedure Rules in 2010, the provisions relating to stay of suits were deleted or excluded. Consequently, the Civil Procedure Rules has no provisions on stay of suits or proceedings. Order XI of the Civil Procedure Rules before 2010 provided as follows:-

“1. Where two or more suits are pending in the same court in which the same or similar questions of law or fact are involved the court may either, upon the application of one of the parties, or of its own motion, at its discretion, and upon such terms as may seem fit-

(a) order a consolidation of such suits, and

(b) direct that further proceedings in any of such suits be stayed until further orders...”

It would appear from the provisions that the stay of suits envisaged under Order X1 rides on the back of consolidation of suits. The court has to consider first whether or not suits ought to be consolidated. Once a decision is made to consolidate, then, as a matter of course, one or more of the suits have to be stayed until further orders. What considerations then ought to be taken into account for an order on consolidation of suits to be made, and with it an order for stay of any of the suits? Order XI was considered in *Stumberg and another vs. Potgieter* (1970) EA 323. In that case, the High Court stated the broad principal relating to consolidation, and by implication, stay of suits. The court stated the principle in the following terms:-

“Where there are common questions of law or fact in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered.”

On the facts of that case, the court concluded that there were deep differences in the claims and the defences in each action and declined to order consolidation and stay of the suits. The decision appeared to lay down the position that where there are deep differences between the claims and the defences in each action, then consolidation and stay ought to be declined.

The principle is that consolidation of suits will be ordered where common questions of law or fact arise of such importance as to make it desirable that the whole of the matters be disposed of at the same time. The would mean that the suits are brought together with a view to disposing of them simultaneously, if the questions of law or fact to be answered in each of them are one or common, and they can conveniently be so disposed of simultaneously. If such common questions arise, but the suits cannot conveniently be handled simultaneously or as one, then they will be consolidated so that some are stayed and some disposed of. The suits of lesser importance, in proportion to the rest, get stayed to await the disposal of those of sufficient importance. The presumption is that the determination of the suits of greater importance will have a bearing on the outcome of the stayed suits.

As mentioned earlier the provision in Order XI of the old Civil Procedure Rules is not in the current version of the Civil Procedure Rules. This should not be construed to mean that the principle stated in *Stumberg and another vs. Potgieter* (supra) is no longer good law so far as consolidation and stay of suits is concerned. The court can apply the principle through the inherent powers of the court. Indeed, in *Harman Singh and others vs. Mistri* (1971) EA 122, it was held, by the Court of Appeal for Eastern Africa, that the High Court has inherent jurisdiction to order a stay in any suit for sufficient reason. The absence of statutory provisions does not therefore bar the court from ordering consolidation and stay of suits.

The other principles governing stay of suits were stated by the High Court in *Motokov vs. Auto Garage Ltd and others* (1970) EA 249. It was said that stay of suits would ordinarily be granted if there is substantial risk that the tribunals seized of the suits are likely to reach conflicting conclusions on the facts. It was emphasized that the possibility of conflicting conclusions of facts being reached by different tribunals is a legitimate factor to be taken into consideration in deciding whether a stay should be granted or not. This would be the case where both suits proceed to hearing simultaneously. To avoid such eventuality, it would be prudent to stay one suit, to allow the other to be heard first. Delay in seeking stay is another factor to be taken into account.

When I look at the issues arising in **HCCC No. 29 of 2009** (OS) and **HCCC No. 719 of 2010**, I find deep differences in each suit. The common factor is the subject property, LR No.28223/2, however, the dispute in each case turns on different facts and points of law. **HCCC No. 29 of 2009** (OS) is a suit under **Section 17** of the Married Women's Property Act, 1882, between husband and wife, where the court is being asked to determine the share of the wife in the property LR NO. (particulars withheld) which has been purchased by the husband; while HCCC No. 719 of 2010, is a suit by the seller of LR No. (particulars withheld) against both the husband and the wife seeking a declaration that LR NO. (particulars withheld) is its property on the grounds that the alleged sale was not completed. The subject matter is common but the facts and points of law involved are vastly different. The outcome of the earlier suit, **HCCC No. 29 of 2009**(OS), has no bearing whatsoever on the outcome of the later suit **HCCC No. 719 of 2010**. **HCCC No. 719 of 2010** is on ownership of LR No. (particulars withheld), HCCC. No. 29 of 2009(OS) is not. The determination of **HCCC No. 29 of 2009** (OS) will not in any way affect the determination of question of the legal ownership of LR NO. (particulars withheld). The determination of **HCCC NO. 29 of 2009** (OS) either way will not prejudice the plaintiff nor the husband in **HCCC. No. 719 of 2010**. Since the issues of law and fact in controversy are not common, the question of the two tribunals seized of the matters arriving at conflicting conclusions is not relevant. In any event there has been delay. **HCCC No. 719 of 2010** was filed in October 2010, the husband, the applicant herein, filed his defence and counterclaim on 25th March 2011. His application for stay was not filed until the 14th November 2012. I find no legal basis upon which I can order stay of **HCCC No. 29 of 2009** (OS) pending the hearing and determination of **HCCC No. 719 of 2010**.

On the prayer for security for costs to be provided by the wife, I am cognizant of the fact that none of the parties addressed me on the point. The law on security for costs was stated by the Court of Appeal in *Shah vs. Shah* (1982) KLR 95. The general rule is that security is normally required from parties' resident outside the jurisdiction, but the court has discretion to order that security be given. In *Southern Oil Supplies Co. Ltd vs. SGS Kenya Ltd* (1991) EA 131, it was held that the court has unfettered discretion to order that security be furnished in any case where it thinks fit, but the applicant has the burden to show cause why the relief should not be granted. No basis has been laid by way of evidence or argument or otherwise to justify the prayer for furnishing of security for costs in this case. No material has been placed before me as evidence that the wife is resident outside the jurisdiction of the court or is planning to go out of the jurisdiction of the court or will be unable to pay costs in the event she loses the case.

The next matter for consideration touches on the jurisdiction of this court to hear and determine **HCCC No. 29 of 2009** on the grounds that the said suit seeks alienation of matrimonial property during coverture. I am invited to consider this matter as an alternative to staying the suit. I note that at the hearing of the application, counsel for the applicant dealt exclusively with this point, and did not advert at all to the prayer for stay.

The contention by the applicant is that this court has no jurisdiction to entertain the matter raised in the suit. Mr. Muriuki, for the husband, cited *Peter Njenga vs. Sophia Ndungu* (supra), where the Court of Appeal stated the position that the High Court has no jurisdiction under **Section 17** of the Married Women's Property Act 1882, 'to alienate ... lands between spouses during their lifetime or unbroken coverture.' In the context of that matter the Court of Appeal took the position that the High Court judge who handled the suit at the primary stage ought to have dismissed in on that ground. Counsel for the wife, Mrs. Thongori, took a contrary position. She argued that there is nothing in **Section 17** of the Married Women's Property Act, 1882 to bar a married woman from filing a suit for division of matrimonial property during coverture.

I have carefully gone through the judgment of the Court of Appeal in *Peter Njenga vs. Sophia Ndungu* (supra). The language of the judgment is clear beyond peradventure. The High Court has no jurisdiction to alienate lands between spouses during their lifetime or unbroken coverture, and that a judge faced with a suit of such nature ought to dismiss it. The law requires that a suit for division of matrimonial property be filed during coverture, but at a time when the coverture is broken by separation or pendency of matrimonial proceedings. It is common ground that the parties to this dispute are still married and together, there is no separation nor are there any pending matrimonial proceedings. In the language of *Peter Njenga vs. Sophia Ndungu* (supra) the parties are in unbroken coverture. I, sitting as a judge of the High Court, have no jurisdiction to alienate the suit land as between them. The decision in *Peter Njenga vs. Sophia Ndungu* (supra) binds me as it has not been demonstrated to me that the position stated in it is no longer the law.

As a matter of public policy the law ought not advance a position whose effect is to undermine the institution of marriage and the stability of the family unit. Alienating lands as between spouses during their lifetime or unbroken coverture clearly weakens the marital bond of friendship and common understanding, undermines the marriage union and destabilizes the family unit. This is against public policy as the family is the foundation of society and its basic unit. Its destabilization makes the family dysfunctional and exposes society to the ills of insecurity, chaos and anarchy. The law frowns upon such effects. I will follow the injunction in *Peter Njenga vs. Sophia Ndungu* (supra) and hold that this suit is incompetent for want of jurisdiction on the part of this court. The suit exists only for the purpose of being dismissed.

In the end, having taken into account the facts of the case and the arguments by counsel and the relevant law, the final conclusion is that the application dated 14th November 2012 succeeds in terms of prayer (iv). The Originating Summons herein dated 5th August 2009 and amended on 8th October 2012 is hereby dismissed for the reasons given above. As this is a matter between parties who are in unbroken coverture, I will not impose costs on the wife; instead I will order that each party do bear their own costs.

SIGNED DATED and DELIVERED in open court

this 15th day of August, 2013.

W.M. MUSYOKA

JUDGE