



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO: 36 OF 2010 (O.S.)

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

AND

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

C W N.....PLAINTIFF/APPLICANT

VERSUS

P N K.....DEFENDANT/RESPONDENT

RULING

There are two applications for determination – dated 28th August 2012 and 28th November 2012. The application dated 28th August 2012 is by plaintiff it seeks restraining orders and citation of the defendant for contempt of court. That dated 28th November 2012 is by the defendant; he would like the consent orders recorded on 11th November 2010 vacated.

The suit herein was commenced on 8th October 2010 by way of Originating Summons dated 7th October 2010. It was brought by the plaintiff, who was then the wife of the defendant, seeking in the main determination of the plaintiff's interest or share in certain properties that she alleges were acquired during coverture. The assets include landed property, motor vehicles and money in named bank accounts.

Contemporaneous with the Originating Summons, the plaintiff filed a chamber summons on the same day of even date, asking for injunctive orders touching on the assets the subject of the Originating Summons. Temporary orders were made on 15th October 2010, centering on the running of a school called [Particulars withheld]. Three days later, on 18th October 2010 to be precise, the plaintiff filed another application, this time a Motion dated 18th October 2010, seeking the committal of the defendant to jail for disobeying the orders made by the court on 15th October 2010.

Coincidentally, the defendant on the same day, 18th October 2010, filed a summons in chambers of even date, asking for injunctive orders targeted at the plaintiff with respect to access to the premises on which the [particulars withheld] School stands, and for a review or variation of the orders made by the court on 15th October 2010. His contention was that the [particulars withheld] School did not exist, and that what existed was the [particulars withheld] School registered in his name.

Both parties filed detailed replies to the two applications through affidavits sworn on 18th October 2010 by the defendant to the application dated 7th October 2010 and 19th October 2010 by the plaintiff to the

application dated 18th October 2010. They also filed lengthy written submissions dated 27th October 2010, 29th October 2010 and 1st November 2010.

Before the pending applications dated 7th October 2010 and 18th October 2010, the plaintiff filed another summons in chambers dated 30th October 2010 seeking to be made signatory to bank accounts opened by the defendant and operated under the name of the [particulars withheld] School. The defendant replied to the application dated 30th October 2010 by his affidavit sworn on 4th November 2010, in which he asserted that he was the sole proprietor of the said [particulars withheld] Academy School and that plaintiff had no interest in it.

All three applications were resolved by consent on 11th November 2010. The plaintiff was to be brought on board as partner, director and school manager of the [particulars withheld] School. She was also to be made a signatory of the school accounts. There were other orders touching on the management and running of the school.

Peace reigned until 7th May 2012 when the plaintiff came back to court with a Motion of even date asking for orders to compel the defendant to sign certain cheques, and, in the alternative, to be allowed to withdraw certain monies from the school account to meet named school expenses. She also asked that the defendant be committed to jail for contempt of court. The defendant replied to the said application. Both parties have put in detailed written submissions and the application is still pending hearing and determination. It is on top of this application that the parties have filed their respective applications dated 28th August 2012 and 28th November 2012.

I have set out the background of this matter, and especially the multiple applications filed by the parties to show that flurry of activity in this matter only turns around one asset, the school standing on LR No. [particulars withheld]. None of the applications touch on the other assets – LR No. Nairobi Block [particulars withheld], motor vehicles [particulars withheld] and [particulars withheld], and money sitting in bank accounts at the Kenya Commercial Bank, K-Rep Bank and Equity Bank. I have noted from the record that since the filing of the Originating Summons on 8th October 2010, direction have not been taken. Three years have lapsed since then. To my mind the issues in controversy in this suit cannot be resolved by the filing of endless interlocutory applications focusing only one of the assets the subject of the case. The court will not be taken in circles. I will not play roulette so far as this matter is concerned.

I note that the application dated 28th August 2012 principally seeks the punishment of the defendant for alleged contempt of court for failing to obey the consent order recorded on 11th November 2010. The procedure for bringing contempt proceedings in Kenya is now notorious. Leave is sought in a chamber application supported by a statement and verifying affidavit. No such application has been filed in this matter and leave has not been granted to commence contempt proceedings. I note that the application is founded on Order 40 of the Civil Procedure Rules as the orders of 11th November 2010 were founded on an application for injunction. However, the scheme of orders comprised in that court order went beyond the injunctive orders, indeed no restraining orders were made. the defendant cannot therefore be cited for contempt in respect of the those orders without invoking the procedure envisaged by section 5(1) of the Judicature Act, Cap 8, Laws of Kenya.

The application dated 28th November 2012 seeks the vacation of the orders of 11th November 2010. The hand written record of the court shows that these orders were by consent. The principles governing the review of a consent order were discussed by the Court of Appeal for Eastern Africa in *Ismail Sunderji Hiram vs. Noorali Esmail Kassam* (1952) 19 EACA 131, where it was stated that a consent order or judgment recorded in court has the effect of decree or order passed upon a new contract between the parties which supersedes the original claim or cause of action. It is generally good consideration and the court cannot interfere with it except in circumstances which offer a good ground for varying or rescinding a contract between the parties. The Court of Appeal in *Brooke Bond Liebig (T) Ltd vs. Mallya* (1975) EA 266 identified the grounds upon which a consent order or judgment may be set aside to include fraud, collusion or any other reason which would enable a court set aside an agreement. Such orders or

judgments can ordinarily only be varied or set aside by consent.

The reasons given in the application for seeking variation of the orders is that the circumstances have changed. The defendant cites the fact that the parties are now divorced and that he has left the matrimonial home. He says that the school is now being run by a board of governors and a parent's teachers association. He accuses the plaintiff of having abandoned the management of the school, among other allegations. The plaintiff in her reply counters this by saying that the school is a private entity with no room for management by a board of governors or parents teachers association. From these averments is see nothing akin to fraud or collusion or misrepresentation or other material that would form basis vitiation of a contract. All there is are general allegations which are not supported in any way by concrete evidence. To my mind no grounds exist for the setting aside or variation of the order entered by consent on 11th November 2010.

My conclusion is that the two applications, dated 28th August 2012 and 28th November 2012, are without merit and I will and do hereby dismiss them with costs.

It is my view that the parties to this suit are engaged in sideshows instead of focusing on the main dispute set out in the Originating Summons of 7th October 2010. The determination of the Originating Summons will finally and completely settle all issues pertaining to the school the subject of the multiple applications that the parties have been lodging in this cause. I hereby confirm the orders recorded by consent on 11th November 2010 before Kimaru J, and direct the parties to fix the Originating Summons for directions in the next thirty (30) days, failing which the same shall stand dismissed for want of prosecution.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 26th DAY OF September, 2013.

W. M. MUSYOKA

JUDGE