



G.N.K.....APPLICANT

P.M.K..... RESPONDENT

RULING

The issue for determination in this Ruling is whether the Notice of Motion dated 20th September 2011 filed by **G.N.K, the Applicant**, is an abuse of the court process and if so whether it should be struck out.

Mr. Moses Odawa, the learned counsel for the Applicant maintained that the said Notice of Motion was properly before the court and was not an abuse of the court process. The issue as to whether the Notice of Motion dated 20.9.2011 is an abuse of the court process was raised by **the Respondent, P.M.K**, in his Preliminary Objection dated 30.9.2011 in which he stated.

- 1. *THAT the prayers sought in the Notice of Motion application herein are Res-Judicata having been conclusively heard and determined vide a ruling and an order made on the 22nd day of September, 2011 in Divorce Cause No.[particulars withheld].*
- 2. *THAT the Notice of Motion application herein was filed while a similar application, seeking similar orders was pending for ruling before a Court of competent jurisdiction in Divorce Cause No.[.....] without the applicant disclosing that fact to this Honourable Court.*
- 3. *THAT the application is an abuse of the court process, in that a Court of competent jurisdiction has heard and determined that no marriage exists as between the parties to warrant the applicant to invoke the provisions of the Married Women’s Property Act.*

The application dated 20.9.2011 made by the Applicant seeks substantially the same orders as were sought by the Applicant in the Notice of Motion dated 20.7.2011 filed in Divorce Cause No[.....] at Milimani Commercial Courts at Nairobi. That Notice of Motion was heard and on 22.9.2011 was dismissed. No appeal was filed against the order of dismissal and no review or setting aside has ever been made. This is not disputed.

The Applicant seeks in this suit which was commenced by Originating Summons dated 20.9.2011 a declaration as to whether the Applicant is entitled to Property No.[...], Dam Estate and motor vehicles numbers [...] and [...] which are described as “family property” by virtue of the Applicant’s alleged contribution. At the

time when the suit was filed on 20.9.2011, the Applicant was not the wife of the Respondent because the marriage between the Applicant and the Respondent was dissolved on 10.6.2009 by a decree nisi issued in Divorce Cause No.14 of 2009 which was subsequently made absolute. In effect, therefore, the action for the said declaration was misplaced as the Applicant could not legitimately invoke Section 17 of the Married Women’s Property Act 1882 as she purported to do so as to institute suit.

In view of the decree dissolving the marriage between the Applicant and the Respondent more than two years before the suit was commenced, it is clear that the suit is a non-starter. I so find. On this ground

alone, I find the suit incompetent.

In absence of the Applicant's status as a married woman the Applicant cannot sue under Section 17 of the Married Women Property Act 1882.

I agree with Mr. Mwangi Kigotho, the learned counsel for the Respondent that the Originating Summons by the Applicant is misplaced. As the Notice of Motion dated 20.9.2011 is founded on an incompetent suit, I hereby strike it out. I also strike out the Originating

Summons of the same date and I award the costs of the application and of the suit to the Respondent.

Dated at Milimani Law Courts, Nairobi, this 16th day

of February 2012.

G.B.M. KARIUKI, SC
JUDGE

COUNSEL APPEARING

Mr. J. Monda of Moses Odawa & Co. Advocates for the Applicant

Mr. Mwangi Kigotho Advocate for the Respondent

Mr. Kugwa, Court Clerk