



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT NO.7 OF 2009 (O.S.)

M.N.M.....PLAINTIFF/APPLICANT

VERSUS

P.N.M.....DEFENDANT/RESPONDENT

R U L I N G

1. The Chamber Summons dated 9th February 2010 seeks orders that the Plaintiff's Amended Originating Summons dated 28th October 2009 and her Notice of Motion dated the same day be struck out under the provisions of **Sections 7, 8 and 9** of the **Civil Procedure Act** and **Order VI Rules 13(1) (a), 2, 3 and 16** of the **Civil Procedure Rules**. The comprehensive grounds in support are that;

"i) The present Suit seeks [a] declaration that the Defendant's properties as set out in the Plaintiff's pleadings are jointly owned by the parties herein by virtue of their marriage relationship which purportedly still subsists as between them.

ii) There is no marriage relationship subsisting as between the parties herein and the present Suit is incompetent under the provisions of the Married Women Property Act (1882).

iii) The fact that there is no marriage subsisting as between the parties herein has been conceded by the parties herein in their respective pleadings filed in this suit.

iv) All the issues arising from the marriage relationship that used to subsist as between the parties herein including the proprietary rights of the parties as between each other have been determined by a valid consent judgment of a Court of competent jurisdiction being Case No.00-0142-Fm In the Circuit Court, Fourth Judicial Circuit In and For Duval County, Florida, In The Matter Of The Marriage Of P.M and M.M.

v) The said consent judgment has never been set aside or vacated.

vi) In view of the said judgment, the present suit is res judicata.

vii) All the issues arising herein have been conclusively determined and the present suit does not disclose any reasonable cause of action against the Defendants.

viii) The present Suit is otherwise an abuse of the process of this Court."

2. Before reverting back to the Application under consideration, I should state that the Amended Originating Summons dated 28th October 2009 is premised on the provisions of **Section 17** of the **Married Women's property Act 1882** and it sought inter-alia declarations that certain properties therein listed were jointly acquired during the subsistence of the marriage between the parties and that the Applicant was entitled to 50% thereof. The Notice of Motion of even date sought orders in the nature of a temporary injunction against any dealings with the named properties until the Amended Originating Summons was heard and determined.

3. The facts relied upon by the Applicant, P.N.M, are that whereas he and the Respondent, M.N.M had been lawfully married, their union was dissolved by a way of a decree by a court of competent jurisdiction and that as regards properties, the matter was settled mutually during the divorce proceedings in the United States of America and therefore the issue is res judicata the present proceedings. Of interest however is the deposition at paragraph 5 of the Supporting Affidavit sworn on 26th November 2009 in response to the Notice of Motion dated 28th October 2009, where the Applicant states as follows;

“That the entire contents of paragraph 5 (of the Respondent’s Affidavit) are hereby denied and I aver that the Plaintiff/Applicant made no contribution to the acquisition of the properties set out in the application, as claimed or at all and that I solely purchased and acquired ALL the said properties before and during the subsistence of my marriage to the Applicant,. The allegations of substantial contribution in the acquisition thereof by the Applicant are mere averments which cannot be substantiated and I verily believe that the same are intended to mislead this honourable Court to make final orders in the matter at an interlocutory stage of the proceedings without the benefit of viva voce evidence by the parties.”

4. The response to the Application for striking out is contained in a Replying Affidavit sworn on 24th February 2010 and the Respondent’s case is as follows;

5. That any reliance on the decision of the Courts in the United States of America cannot be justifiable as those Courts have no jurisdiction in respect of property situated in Kenya and/or belonging to the citizens of Kenya. The same Courts, she argues, also lack jurisdiction to determine any issues regarding a company registered in Kenya and also as regards any marriage contracted under Customary Law.

6. Further, that the document allegedly executed by the Respondent in the U.S.A. in conceding to the divorce proceedings was signed under duress and threats of repatriation and is therefore void ab initio.

7. In her Affidavit, she has raised other issues whose import is this; that the Applicant has engaged in criminal activity including forgery related to the properties in dispute and lastly, that the parties are still married under Kikuyu Customary Law and the **Married Women’s Property Act 1882** applies to the present dispute. The same issues were reiterated in the Affidavit sworn by the Respondent on 5th March 2010 and they need no repeating.

8. I have taken into account the Affidavit sworn on 30th May 2010 by the Applicant which also reiterates his case as elsewhere set out above save that at paragraphs 5, 6 and 7 he has reproduced the decision of the Circuit Court, Fourth Judicial Circuit, in and For Dural County Florida. U.S.A. in Case No.00-0142-FM. In the Matter of P.M and M.M in the year 2000.

9. I have also read the useful Submissions and authorities filed by the Advocates and I mean no disrespect when I do not reproduce them in this Ruling.

10. In determining the Application for striking out, I must begin by restating the words of Madan J. A. in D.T. Dobie & Co. Ltd vs. Muchina [1982] KLR 1 at page 9 where the learned judge stated as follows;

“The Court ought to act very cautiously and carefully and consider all facts of the case without

embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the Court. At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the Court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra)). As far as possible indeed, there should be no opinions expressed upon the Application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.

If an action is explainable as a likely happening which is not plainly and obviously impossible, the Court ought not to overact by considering itself in a bind summarily to dismiss the action. A Court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of a case before it.”

11. In the above case, the Defendant had sought striking out of the Plaintiff and the words above were used in addressing that issue, a situation similar to the one before me.

12. **Is the Amended Originating Summons and the Notice of motion predicated upon it so hopeless that there is nothing to be taken forward for trial?** I do not think so and I say so for the following reasons;

13. There is no doubt that in the case before me there are a number of issues that cannot be settled by a summary dismissal of the case. They include;

i) *Whether the **Foreign Judgments (Reciprocal Enforcement) Act, Cap. 43** applies to the present dispute.*

ii) *Whether the Court in Florida, U.S.A. has jurisdiction to dissolve a marriage contracted under Customary Law.*

iii) *Whether the divorce case in U.S.A. and the terms of settlement entered into between the parties affected the properties that are situated in Kenya and which were not named in the settlement.*

iv) *Whether the Respondent received USD 20,000 and whether the receipt of that money disentitled her to any claim from the applicant whatsoever.*

v) *Whether the Respondent’s signature was forged and which signature allegedly signified her voluntary resignation from (particulars withheld) Investment Limited.*

vi) *Whether the doctrine of res judicata can be invoked in the present case.*

14. The above issues are not idle and like Madan J. A. in D.T. Dobie (supra), it is not the place of this Court sitting in an Interlocutory Application to purport to determine them on the basis of Affidavits and where each party has not been subjected to cross-examination. I have elsewhere above reproduced paragraph 6 of the Applicant’s Affidavit sworn on 26th November 2009 and I agree with him that viva voce evidence is the best in determining the issues in contest.

15. Without saying more and without taking the place of the trial Court, I see no reason to strike out the

documents elsewhere above stated and the matter should go to full trial. The Submissions so ably put forth by the Advocates in support of their client's positions are best placed before the Court for it to make a final decision on the merits.

16. The Application dated 9th February 2010 is dismissed but each party will bear its own costs.

17. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2012.

10/2/2012

CORAM

BEFORE LENAOLA – JUDGE

MIRON – COURT CLERK

MR. MACHARIA HOLD BRIEF FOR MR. GATHERU FOR APPLICANT

NO APPEARANCE FOR RESPONDENT

ORDER

RULING DULY READ.

**ISAAC LENAOLA
JUDGE**

FURTHER ORDERS

MENTION ON 28TH FEBRUARY 2012 BEFORE G.B.M. KARIUKI, JUDGE FOR FURTHER DIRECTIONS.

NOTICE TO ISSUE.

**ISAAC LENAOLA
JUDGE**