



REPUBLIC OF KENYA

High Court at Nakuru

Civil Suit 170 of 2010

IN THE MATTER OF AN APPLICATION BY DYSSELEER MIREILLE LESOIPA UNDER SECTION 17 OF THE MARRIED WOMEN PROPERTY ACT 1882 AS AMENDED

**DYSSELEER MIREILLE LESOIPA.....
.....PLAINTIFF**

VERSUS

**MANUAL LESOIPA *alias* EMMANUEL LESOIPA.....
.....DEFEDANT**

RULING

This dispute has a sad history. The plaintiff and the defendant’s marriage has been dissolved and a decree *nisi* issued. Before this, the plaintiff had brought this originating summons seeking division of matrimonial property.

Since 2010, the summons has not been heard on account of the defendant’s ill-health, and there are no signs of improvement. Because of this state of affair, the court issued a commission in terms of **Section 52 and 53** of the **Civil Procedure Act** for the evidence of the defendant to be taken by the Senior Resident Magistrate, Maralal.

Upon examining the defendant who was in a car, due to his condition the magistrate noted of him as follows:

“He looked disheveled and had a blank stare. Apparently, he cannot walk as his lags are paralyzed. His speech is slurred and he seemed to have hearing difficulties. I had to repeat almost all the questions. He was disoriented in time and person. It is my finding that I could not take any statement or evidence from him.”

That was on 12th July, 2011. In October, 2011, his advocate informed the court that the defendant had not improved and could not talk. On 13th July, 2012, counsel informed the court that the defendant’s condition had deteriorated and sought today’s date. Today, counsel explained that the situation is not any better as the defendant cannot even speak.

Learned counsel for the plaintiff protested arguing that we have heard enough about the defendant’s health; that the defendant is enjoying proceeds of the disputed properties to the exclusion of the plaintiff. He proposed that plot No.14 Maralal Township be transferred to the plaintiff, in the meantime, a proposal which was rejected by the defendant’s advocate, insisting that if the defendant was to let the plaintiff retain plot No.14 then the latter must also let the defendant retain plot Nos.33 and 112, Maralal Township.

The nature of the defendant's illness has been given in a report filed by Dr. Kuria, J. K., a Medical Officer, Samburu dated 19th March, 2011 as follows:

“The above aforesaid has been sick on/off with several admission in our institution secondary to immunosuppression, resulted to have become hemiparetic from 2009 as a result of cryptococcal meningitis with vasculitides, currently unable to walk, with difficulty in talking..... his orientation, memory and cognitive function are still distorted.”

It is acknowledged even by the plaintiff that the defendant is sick. What seems to concern the plaintiff is the seriousness of the defendant's condition that is said to make it difficult if not impossible for him to attend court and testify. Being the principal party in this matter and in view of the nature of the dispute, the necessity of the defendant's personal presence and presence of proper state of mind cannot be gainsaid.

I have on more than one occasion challenged the plaintiff's counsel to move the court appropriately if such procedure exists, to have the matter proceed in view of the defendant's condition. No application has been brought, I suppose, because there is no procedure in our system of appointing a guardian *ad litem* or next friend in a situation where the party is only sick.

Further, **Section 124** of the **Evidence Act** is clear that a person considered by the court not capable of giving rational answers or understanding questions put to them as a result of disease whether of body or mind are not competent to testify.

In order to satisfy the plaintiff and the court on the true condition of the defendant and in view of the fact that the last medical report was over 1 year ago, it is ordered that:

- i) there will be a fresh medical report compiled by the Medical Officer, Samburu after examination of the defendant on 26th September, 2012 in the presence of a doctor representing the plaintiff;
- ii) the report to be countersigned by plaintiff's doctor and filed within 7 days from the date of the examination;
- iii) both counsel to be at liberty to call and cross-examine the doctors;
- iv) plaintiff is free to move the court appropriately.
- v) mention 19/10/2012;

Dated, Signed and Delivered at Nakuru this 19th day of September, 2012.

**W. OUKO
JUDGE**