



IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 532 OF 2009

MARY NJERI MUIGAI..... PLAINTIFF

VERSUS

PETER NYOIKE MUIGAI & 2 OTHERS.....DEFENDANT

Coram: Mwera J

Gatheru for plaintiff

Njenga for defendant

Njoroge, court clerk

RULING

On 24.6.2010, a composite ruling covering two notices of motion, one dated 7.10.09 and another amended on 22.1.10, issued. Therein the court observed and directed **inter alia** that:

“From the various orders on the file and that some applications may still be pending, it is directed that the last orders do remain in force until the determination of this suit or further orders. The next listing is for trial.”

Earlier on in the ruling the court had remarked on what the parties should put in place, before coming for mention in 30 days on the road to trial of suit. That was not to be because the parties seem to have ignored the directions and gone ahead to file other interlocutory applications e.g. the one dated 19.7.10, thereby acting in a manner likely to affect the final determination of the suit herein – a thing which in essence would end the dispute once and for all.

The application of 19.7.10 sought to further amend the plaint and to extend the injunction orders already in place to include a certain parcel of land known as NYAHURURU MUNICIPALITY BLOCK 6/443 (not no. 442?) . The court was asked to consider directions to the effect that rents payable on plot LR No. 36/11/447, Nyahururu Block 6/442, 443 be deposited in joint bank account of the 2 firms of the lawyers acting for the parties herein.

It was stated in the grounds that the plaintiff had only recently got to know the proper and correct reference of the Nyahururu Block 6/442 through pleadings/documents in HCCC No. 7/09 (O.S) and as such the injunctive orders need to be extended to that property. A supporting affidavit accompanied the

application. An ex parte order was granted on 11.10.10.

A replying affidavit was filed alleging all manner of things as to why the application of 19.7.10 was defective, bad in law and even **res judicata**. And that without an application for review, the parcel Block 6/443 should not be affected by the earlier injunction orders at all. Several other aspects were brought to the fore including a Consent Final Settlement of Dissolution of Marriage issued by the Circuit Court of Duval County, Florida USA on 5/2/2002 signed by both the plaintiff and the 1st defendant (husband and wife). This, it was contented, was the basis of division of property between the two here in Kenya, in the US and even in UK. To the 1st defendant, the properties in Kenya either in Nairobi or Nyahururu were owned by the 3rd defendant, Petmar Investments Ltd, and when the plaintiff waived her share as per the US consent referred to, she cannot now turn round while in Kenya and claim interest in the properties or the rent proceeds therefrom.

The court heard Mr. Gatheru for the plaintiff/applicant and Mr. Njenga for the defendants at length in the context of the ruling of 24/6/10 (above), the US consent, plus another called comprehensive consent dated 11.11.09 filed by the parties and adopted by court. Also referred to was another order 2.2.20 by which this court froze a certain account of the 3rd defendant into which it was claimed rents from the properties in Kenya were going and the 1st defendant was enjoying.

In the context of the ruling of 24.6.11 that there were various orders on the file, nothing can be interpreted to mean that when on 2.2.10, the 3rd defendant's account was frozen, that was the last order to remain in force until the trial of the suit. The various orders on the file including the one of 19.11.09 were not varied or reviewed by the freezing order of 2.2.10. On 24.6.09 the court recognized that other orders were validly on record and the parties had to honour them up to the ruling of 2.2.10. After all the order of 19.11.09 was by consent. It was adopted and signed by the Deputy Registrar. Mr. Gatheru told the court that the defendants had dragged their feet in opening a joint bank account in the name of counsel of both parties and he wondered why. In this court's view that order has not been set aside or reviewed. It remains in force. The court froze the 3rd defendant's account on 2.2.11 because it was informed that even without complying with the consent orders of 19.11.09, the 1st defendant was drawing money from the 3rd defendant's account. In short the orders of 2.2.10 as at 24.6.10 could not have been taken by the defendants to mean that it was the last and only order to be obeyed. They had obligation to obey the other earlier orders including the one of 19.11.09, and they are apparently in breach and defiance of that order without justification. Indeed by putting the consent order of 15.11.09 into effect the freezing order of 2.2.10 will be spent. Are the defendants, especially the 1st defendant acting without bad faith or is he giving honest instructions to his lawyers in this matter? Hardly. Agreed, in matters of this nature there tends to be acrimony and a good measure of that is attendant here and also a proportion of not-so-much good faith may feature. But such should not muddy the stream of justice. That stream should have headed to its final destination with the parties preparing this suit for trial. That will resolve all their disputes, leaving no need for skirmishes as this one. Even the issue of the Petmar Investments featuring in the Duval Circuit consent will be resolved.

In the end orders are granted in the circumstances of this case that there be a further amendment of the plaint which should be filed, paid for and served. With the further amended defence now featuring Block 6/443 or such as the parties know, injunction orders in place to affect that property. The parties to comply with and put into effect the rent deposits from all the properties in a joint account in the names of the parties' current lawyers, so that the consent order of 19.11.09 is effectuated. This to be done in the next 14 days. In default, liberty to apply. Each side to bear its own costs. The above orders are interim and conservatory. No party shall suffer prejudice until the trial determines their respective rights.

Lastly the parties to prepare the suit herein for trial in conformity with Civil Procedure Rules 2010.

Delivered on 24.3.11.

J. W. MWERA
JUDGE