REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

CIVIL CASE 7 OF 2007

LUCY MWENDWA MUURU ……..…….. PLAINTIFF

VERSUS

TONY GITHUKU ……..……. DEFENDANT

RULING

Before the Court is Chamber Summons dated 19th January, 2008 filed by the Defendant herein. It is premised under Section 3A of the CPA and Order VI Rules 13(1) (a) and 16 of the Civil Procedure Rules and of course all other enabling provisions of the Law.

The said summons mainly seeks prayers to strike out the plaint dated 2nd May, 2007 filed by the Plaintiff. It is supported by the following grounds:

a. **That the Plaint discloses no reasonable cause of action.**

b. **That the Defendant, to the Plaintiff's knowledge, had no capacity to make the alleged promise to marry.**

c. **That the Defendant lacked capacity to marry the Plaintiff.**

d. **That the Plaintiff has no** *locus standi* **to seek division of the Defendant's property.**

e. **That the Defendant was not the Plaintiff's employer and therefore had no capacity to remove the Plaintiff from her employment.**

f. That it is in the interest of justice and expediency that the Plaintiff's suit be struck out with

costs to the Defendant.

As directed by the court, written submissions by both the counsel were filed, on the Notice of Preliminary Objection dated 22nd October, 2007.

The Plaint dated 2nd May, 2007 was filed on 10th May, 2007. It seeks mainly prayers for:

(1) Declaration of presumption of marriage between the Plaintiff during the period 2003 to 2006.

(2) Damages for breach of promise to marry and misrepresentation that his marriage previously had irretrievably broken down.

(3) Damages for unlawful and malicious assault, undue influence and abuse of office leading in removal of Plaintiff from the employment at the Kenya Commercial Bank.

(4) A declaration that the Plaintiff is entitled to 50% interest in all the properties, benefits and dues acquired by the Defendant with the Plaintiff's contribution during the period of cohabitation.

(5) Costs etc.

The Defendant/Applicant has filed a detailed statement of Defence and Counterclaim. The Plaintiff/Respondent also filed a Notice of Motion dated 21.9.07 to seek restraining orders against the Defendant/Applicant which was responded to by him by a replying affidavit sworn on 22nd October, 2007. The purpose of specifying the above proceedings is to show which proceedings are on record which this court is entitled to look at while determining the Notice of Preliminary Objection.

There are some undisputed facts which emerge from the pleadings, namely:-

(1) The Defendant/Applicant is married to one Susan Nakhanu Wakhungu on 8th November, 1986 a certified copy of Entry of marriage dated 5th September, 2003 is on record.

(2) The Plaintiff/Respondent by her own pleadings has shown that she was aware of the said marriage of the Defendant/Applicant (see paragraph 5 of the plaint, paragraph 4(c) and paragraph 15 of the Reply to Defence and Defence to counterclaim and lastly prayer no(b) of the plaint).

(3) The parties were work-mates at Kenya Commercial Bank.

Ms Machio in support of the Notice of P.O. contended mainly that:-

(a) The Defendant/Applicant had no capacity to make a promise to marry.

(b) There cannot be a presumption of marriage when a monogamous marriage is subsisting.

(c) The Plaintiff/Respondent had no *locus standi* ***to seek for division of properties alleged to have been acquired during the cohabitation as she is not a spouse as per Section 17 of the Married Woman's Property Act of 1882.***

The scope of Preliminary Objection has been clearly specified in the famous case of **Mukisa Biscuit Manufacturing Co. Ltd. Vs- West End Distributors Ltd. (1969) E.A.C.A 696. At page 700**. Law J.A. has observed namely:

"**So far as I am aware, a Preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which, if argued as a preliminary point, may dispose of the suit".**

Sir Charles New bold P. on page 701 further clarified its scope and observed:

"**A Preliminary point is in the nature of what used to be a demurer. It raises pure point of law which is argued on assumptions that all the facts pleaded by the other side is correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."**

Furthermore, the only point which was contended by the Plaintiff/Respondent is that the power to strike out a pleading is a judicial discretion and should be exercised after proper care, sparingly and only in a very clear and obvious case.

The High court case of **Kassam Vs. Bank of Baroda (K) Ltd. (2002) I KLR 294** was relied upon. The court held at page 308 namely:

"***the power to strike out a pleading is a very strong power indeed, and one which, if it is not most carefully exercised might lead a court to set aside a suit or defence in which there might be really after all be a right or defence and in which the conduct of the opposite party might be very wrong and that of the other party might be explicable in a reasonable way. So generally, unless it is a very clear case indeed, the power ought not to be invoked, and unless the case is absolutely clear, a pleading ought not to be struck out as not showing a reasonable cause of action or defence, as the case may be."***

I am thus urged that I should exercise my judicial discretion in favour of the Plaintiff/Respondent and dismiss the Preliminary objections so that the suit be considered on merits.

With the above mentioned principles before me and which principles, I am attuned to accept as a correct propositions of law, I shall now deal with the submissions made by the learned counsel for the Defendant.

As regards the first issue is concerned, it was simply contended that the Defendant/Applicant being lawfully married to his wife and the said marriage has not been dissolved he lacked any capacity to make a promise to marry.

In the case of **M. -Vs. V. (2008), I KLR** (**G and F) page 313**, our Court of Appeal held that:

"**The presumption of marriage covers two aspects; that the parties have capacity to enter into a marriage and that they did so in effect."**

The court further observed as under on page 317:

"**But serious problems arose. Mr. Muthoga very properly pointed out that this court must give a logical interpretation to section 37 of the Marriage Act (Cap 150). To answer the spirit of this provision, it would be impossible to evade its unambiguous terms, and to hold that a marriage existed during the continuation of a previous monogamous marriage. It would not be right to acknowledge that existence by presuming that a marriage at customary law had been entered into. Indeed, if Fender v. Mildmay (1938) AC 1, is considered, it would be wrong to "promise" to marry a third party before a decree nisi of divorce had been granted. Hence, if the *adulterous association arose and ended during the continuance of a previous marriage, it would always be an illegitimate association*. The presumption covers two aspects, that the parties had the capacity to enter into a marriage, and that they did so in effect. During the continuance of a previous marriage, the already married party would have no capacity to enter into the new marriage, and *the new marriage would be null until the previous marriage had been brought to an end by a final decree of divorce*, such as a decree absolute (see Rayden on Divorce 12th Edition volume 1 page 600 – the latest edition is to the same effect). (*emphasis mine*)."**

After the court observed as above, it also considered the famous case of **Hortensia Wanjiku Yaweh -vs- Public Trustee Misc. Case No.16 of 1977** – a land mark case on the issue of presumption of marriage and have this to hold:-

"***This is not a case which falls within the ambit of*** **Hortensiah Yawe –vs- Public Trustee** or **Mary Njola –vs- John Mutheru and others** **(Civil Appeal No.71 of 1984)**. ***This case falls under Hill –vs- Hill (1959) 1 All E.R. 281 if it is to be upheld at all. In view of the statutory prohibition,*** (***emphasis mine***). **The most the parties could achieve was a state where they intended to marry when free to do so."**

The above two cases were considered by this court in Civil **Appeal No.40 of 2003** between **Ephraim Waithaka Ruith and Joyce Mukabi Njenga** and agreeing with the Court of Appeal in **M's case** (***supra***), I held that the parties had no capacity to marry during existence of a previous monogamous marriage.

I can further get support by the fact in the Law of Succession Act (Cap 160), the Parliament had to provide for a specific statutory provision to cater for a woman marrying under customary law to a man despite the existence of prior or subsequent monogamous marriage {see Sec.2(5)}. I may not comment much further on the said proviso except to state that a presumption of marriage by way of cohabitation during subsistence of a monogamous marriage can only be provided for by way of a statutory provision and God forbid for such an enactment.

The Matrimonial Causes Act prohibits such marriages and I do tend to agree with the contentions raised on behalf of the Defendant/Applicant, that the presumption of marriage, if allowed, would tantamount to allowing bigamy and any orders sought on the basis of such presumption of marriage would be from an immoral and illegal contract.

I would go along with Ward L. J. with whom other judges concurred when he observed in the case of **Whiston –vs.- Whiston (1998) 1 All E.R. 423,** namely:-

"***Where the Criminal act (of bigamy) undermines our fundamental notions of monogamous marriage, I would be slow to allow a bigamist then to assert a claim, on entitlement at which she only arrives by reason of her offending".***

Moreover, I would also like to cite the following passages from the case of Holman –vs.- Johnson (1775 - 1802) All E.R 98.

"**The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is allowed; but is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this;** *ex dol malo no oritur action*. **No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the Plaintiff's own stating or other wise, the cause of action appears to arise** *ex turpi causa***, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault,** *potior est condition defendentis".(**Emphasis mine**).*

Having observed as such, I shall have to agree that when the Plaintiff/Respondent knew about the existence of the marriage of the Respondent she ought to have known that the promises, even if made by the Defendant/Applicant, are unenforceable. The simple reason is that such promise is against the public policy specially in respect of a monogamous marriage. (See **Wilson Vs. Carneley {(1908 – 10) All E. 120**}. I say so because the Customary Laws of almost all the Kenyan tribes do allow polygamy.

Lastly, I shall now deal with the prayer of division of properties as prayed by the Plaintiff/Respondent i.e.

(d)"**A declaration that the Plaintiff is entitled to 50% interest (sic) in all the properties, benefit and or dues acquired by the Defendant with the Plaintiff's contribution during the period of**

cohabitation" (emphasis mine)."

From the wordings of the said prayer sought for, I would tend to agree that the Plaintiff/Respondent is seeking share of her contribution as "***a presumed wife***." And that she claims her right as provided under Sec.17 of the Married Woman's Property Act, 1882. As per the said section the right to ask for shares or divisions of matrimonial properties acquired during cohabitation is only given to "***a spouse"***. That is a husband and wife. This presupposes that the couple is either married or had acquired the status of a married couple.

Unfortunately, for the plaintiff/Respondent that status is not available for her under the Married Woman's Property Act, 1882.

However, I may pause here and ponder whether she could seek some contribution or share for her financial contribution towards acquisition of some properties. She can explore that possibility by way of a separate Civil suit, though I may hasten to state that under this plaint, and the manner in which she has sought the prayers, she is not capable to do so and I do find so.

I have already considered the submissions made by the Plaintiff/Respondent in the earlier part of this ruling, and do find that this is a very clear case where the preliminary point of law as raised can be determined.

In view of the premises aforesaid, I am afraid that I have no alternative, but to agree with the contentions of the Defendant/Applicant and do strike out the Plaint. I am not happy to make these findings, but the law calls upon me to find so, as in my considered view, hearing the suit shall be an undue waste of judicial time and an expense.

The upshot of the above is that I allow the Preliminary objections raised by the Defendant/Applicant and strike out the Plaint. However, in the circumstances of the case, I shall order that each party shall bear its own costs.

Dated, Signed and **Delivered** at Nairobi this 18th day of June, 2009.

K.H. RAWAL

JUDGE

18.6.09