REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Originating Summons 1 of 2009

IN THE MATTER OF: THE MARRIED WOMEN PROPERTY ACT 1882

AND

IN THE MATTER OF: QUESTIONS ARISING BETWEEN AMINA ALI ABDALLA AND FEISAL MOHAMED ALI CONCERNING TITLE AND POSSESSION OF HUSE ACQUIRED BEFORE MARRIAGE

BETWEEN

AMINA ALI ABDALLA ……. APPLICANT/RESPONDENT

V E R S U S

FEISAL MOHAMED ALI ……. RESPONDENT/APPLICANT

RULING

This is an application by the Respondent, Feisal Mohamed Ali, which seeks to mainly set aside the ex-parte injunction obtained on 4th June, 2009 in default of filing a replying affidavit. The Respondent further seeks that the draft replying affidavit annexed to the application be deemed as duly filed and served upon payment of the requisite court fees. The application is based on the grounds that the Respondent on being served with the application for injunction instructed counsel who entered appearance but did nothing else despite instructions to oppose the application for injunction with the result that an ex-parte injunction was granted against the Respondent. The Respondent also contends that the injunction was granted against him because of a mistake of counsel which should not be visited upon him and that in the interest of justice the ex parte injunction should be set aside and he be accorded an opportunity to file a Replying Affidavit.

The application is supported by an affidavit sworn by the Respondent. In the affidavit it is deponed that the Respondent stands to suffer substantial loss and damage if his application is not granted and that he has a good defence which disputes the applicant's claim on substantial grounds. Annexed to the affidavit is a draft affidavit in opposition to the applicant's claim. In the said draft Replying Affidavit, the respondent depones that the suit property is solely his and developed the same before his marriage to the applicant. It is further deponed that the respondent allowed the applicant the use of one house on the suit property but sold a second house thereon to one Joseph Kariuki Kibara who is now joined as an interested party which fact was well known to the applicant before commencing these proceedings. In the premises, the applicant's claim is denied by the respondent.

Mr. Gikandi, Learned Counsel for the Interested Party, associated himself with the submissions of counsel for the respondent and he too urged that the respondent's application be allowed. The application is opposed by the applicant and there is a replying affidavit sworn by the applicant in which it is deponed *inter alia*, that the mistake of the respondent's counsel should not be visited upon the applicant. It is also deponed that the property in dispute was developed by the applicant before her marriage to the respondent and that she did so from her own resources. In the premises the applicant prays for dismissal of the application.

The application was canvassed before me on 19th August 2009 by Mr. Oloo, Learned Counsel for the respondent, Mr. Gikandi, Learned Counsel for the Interested Party and Ms Osino, Learned Counsel for the applicant. Counsel restated the stand-points taken by their clients in their respective affidavits.

I have considered the application, the affidavits filed together with the annextures thereto. I have further given due consideration to the submissions of counsel. Having done so, I take the following view of the matter. Rule 4 of order XXXIX of the Civil Procedure Rules gives the court an unfettered discretion subject to the dictates of justice. The discretion is intended to be exercised so as to avoid injustice or hardship to a litigant resulting from accident inadvertence or excusable mistake or error. It is also not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. As with an interlocutory judgment where such an order has been lawfully and properly obtained, the court will not usually set the same aside unless it is satisfied that there is a defence on merits ie a defence which raises one or more bonafide triable issues that should go to trial for adjudication.

In the present application, the respondent was served with the Originating Summons and application for injunction and duly instructed counsel to represent him in the matter. Counsel entered appearance on 31st March 2009 and infact attended the court when the application for injunction came up for hearing inter partes on 2nd April, 2009 and sought and obtained an adjournment to enable him file a replying affidavit. He never did so, with the result that when the injunction application was again fixed for hearing and he failed to attend counsel for the applicant quite properly applied for orders as prayed in the application for injunction. In the premises, the injunction was regularly obtained.

It is clear that the respondent, on being served with the Originating Summons and the application for injunction did what was expected of him. He instructed counsel. Surely, he cannot be faulted for doing so. He did not know that nothing was being done about the documents he handed over to his former advocates. Should such a litigant be punished because of his counsel's omissions? Counsel for the applicant contends that the respondent has a remedy against his counsel for professional negligence. That may very well be the case but would the course of justice be thereby served? I think not. In the case of **Philip Chemwolo & Another -V- Augustine Kubende [1982-88] I KAR 1036**, Apeloo J.A as he then was delivered himself as follows:-

"***I think a distinguished equity Judge has said:***

'***Blinders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits'***

I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach there is no error or default that cannot be put right by payment of costs. The court as often said, exists for the purpose of deciding the rights of the parties `and not for the purpose of imposing discipline."

In **Ngome –V- Plantex Company Ltd [1984] KLR 792**, Chesoni Ag. J.A. as he then was, in allowing an appeal against an order refusing to set aside an ex parte order of dismissal of a suit, held at page 798 as follows:-

"***By dismissing the appellants application as incompetent in that it could not be preferred under rule 8, both the magistrate and learned judge, did not consider its merits and consequently, they failed to take into account matters they ought to have taken into account, which is an essential consideration in the***

exercise of a discretion:

*… **and as said by Hancox, J.A in Herman Mugachie supra, by visiting the error of his advocate on the unfortunate appellant, the two lower courts denied him the right of having his case heard at all. That as said by Ainley J (as he then was) in Sodha –V- Hemraj [1952] Uganda LR Vol. 7 p. 11 should be the last resort of any court."***

I cannot, but agree with the observations made by the above eminent judges. The applicant does not allege that the respondent is guilty of fraud or has intention to overreach. The respondent cannot also be accused of deliberately getting out to obstruct or delay the course of justice.

I have perused the draft replying affidavit. In my view the same raises various bona fide triable issues such as whether or not the houses constructed on the suit property were constructed before the marriage between the parties herein; whether or not the applicant had capacity to develop the same; whether or not the respondent's interest in the suit property had been disposed of to the interested party with notice to the applicant; whether or not the Married Women Property Act 1882 is applicable e.t.c. Those are not the only issues disclosed by the affidavits filed. The respondent need only demonstrate that there is one bonafide triable issue that should go to trial to be entitled to his day in court. In my view the issues raised by the respondent are serious issues. At this stage I am not required to make a finding as to whether the respondent will succeed in establishing those issues as long as they are bona fide triable issues.

I have also considered whether the applicant would be compensated by costs for any delay to be occasioned by setting aside the ex-parte injunction. I have come to the conclusion that the applicant can be adequately compensated by costs.

The upshot is that the respondent's application dated 23rd July 2009 is allowed. The ex-parte injunction granted against the respondent on 4th June, 2009 is hereby set aside. The draft Replying Affidavit annexed to the application is deemed duly filed and served with the leave of the court on payment of the requisite court fees.

The Applicant is granted leave to file and serve a further affidavit if need be within 7 days from the date hereof.

The respondent shall pay to the applicant the costs of this application and costs thrown away. Those then are the orders of the court.

DATED AND DELIVERED AT MOMBASA THIS 2nd DAY OF SEPTEMBER, 2009.

F. AZANGALALA

JUDGE

Read in the presence of: -

Ms. Osino for the applicant, Mr. Oloo for the Respondent and Mr. Gikandi for the Interested Party.

F. AZANGALALA

JUDGE

2.9.2009