REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(NAIROBI LAW COURTS)

Civil Suit 36 of 2005

JOAKIM MWANDALE OKESSA.....................................PLAINTIFF

VERSUS

MAJOR GENERAL OPIYO......................................1ST DEFENDANT

JUDITH ABRAHAM'S GUSERWA............................2ND DEFENDANT

RULING

The plaintiff moved to this court, by way of a plaint dated 23rd April, 2004 and filed on the same date. The salient features of the same are as follows:-

- The plaintiff and 2nd defendant were married under Luhya customary law and they have three issues between them.

- During the subsistence of the said marriage, they jointly contributed to the construction of a matrimonial home namely LR. NO. 12219/8.

- In the year 1998 the second defendant petitioned for divorce in Kiambu law courts, followed by filing of HCCC NO. 5/2001 Nairobi in which the plaintiff therein sought eviction orders against the defendant therein who is the current plaintiff, which orders were granted by Rawal J, thus separating the two who are no longer cohabiting with each other.

- The plaintiff moved to this court, because the 2nd defendant proceeded to lease the said matrimonial home to the first defendant at a monthly rental of Kshs. 150,000, which amount the plaintiff has no access to.

In consequence thereof, the plaintiff seeks orders that:-

(a) A declaration that without the plaintiffs consent, involvement or knowledge, the defendants tenancy agreement is in consistent with the plaintiffs' right under section 17 of the married women property Act 1882 and a further declaration that the plaintiff is entitled to half the proceeds of the rent from the month of March 2003, when the first defendant first took possession of the said matrimonial house upto the date when the 1st defendant shall either be evicted or give up vacant possession of the plaintiffs' matrimonial house located at LR. NO. Nairobi Block 12219/8 Langata Road.

(b) A permanent or mandatory injunction compelling eviction of 1st defendant from the matrimonial property situate on land title number LR. NO. Nairobi Block 12219/8 Langata Nairobi.

(c) Costs of this suit and interest thereon.

(d) Any other or further relief that this Honourable court deems fit and just to grant.

On this plaint, the plaintiff anchored an interim application by way of chamber summons dated 3rd April 2004 and filed the same date, seeking an order that a temporary or mandatory injunction be granted to the plaintiff/applicant compelling the 1st defendant to give vacant possession of the plaintiffs' matrimonial property situate on LR. NO. 12219/8 Langata Nairobi and that costs be provided for. The 2nd respondent filed a replying affidavit to the same sworn by one Judith A. Guserwa on 20th May 2004 and filed on the 25th May 2004.

Before the afore said application was heard, the defendants presented an application by way of chamber summons brought under order V1 rules 13 (1) and (d) of the CPR and section 3A of the CPA and all other enabling provisions of the law. It seeks two prayers namely:-

1. That the Honourable court be pleased to stricke off the plaintiff's suit against the 1st defendant.

2. That cost of this application be provided for.

The same was supported by grounds in the body of the application and supporting affidavit. This application was withdrawn, and defendant granted leave of court on 9/10/2008 to file another one hence the filing of the application subject of this ruling dated 24th day of October 2008 and filed on 31st day of October 2008. It is brought under the same provisions of law namely under order VI rule 3 (a) and (b) and (d) of the CPR. The same prayers that had been sought in the withdrawn one are replicated namely:-

1. That this honourable court be pleased to strike out the plaintiff's suit against the defendants.

2. That costs of this suit and this application be awarded to the defendants.

The grounds in support are set out in the body of the application, supporting affidavit and oral submissions in court. The major ones are:-

- The matter sought to be litigated upon is Resjudicata as the same was settled by the decision in Nairobi HCCC NO. 5/2001, which proceedings was between the plaintiff and the 2nd defendant. There is no lawful claim capable of being sustained as against the first defendant because of the following reasons:-

(i) The lease had been entered into between the 2nd defendant and the office of the president and not the first defendant.

(ii) The same expired on 3/3/2008.

(iii) Since the claim touches on matrimonial property, then the best forum to deal with that is HCCC NO. 5/2001.

(iv) The application is to be allowed as the same is undefended as there are no grounds of opposition or replying affidavit filed.

The plaintiff/respondent indeed filed no grounds of opposition or a replying affidavit but made oral representations and the strong points relied upon by them are as follows:-

- The application is in competent in that it is accompanied by an affidavit and yet order 6 rule 13 (a) makes provision that such applications are not to be supported by an affidavit.

- Prayer under order 6 rule 13 (a) cannot exist alone. They have to be accompanied by prayers under order 6 rule 13 (b) (c).

- The plaint as presented is proper as the same is not an originating summons but was just transferred to the Family Division because it touched on matrimonial property.

- The defendant has filed a defence and both pleadings raise triable issues which should be disposed off on merit and as such the court, is enjoined not to employ a draconian rule to strike out a suit which raises triable issues.

- Contend that the matter is not Resjudicata because the parties to the proceedings are not the same because.

(i) The 1st defendant herein was not a party to the proceedings in HCCC NO. 5/2001

(ii) Issues canvassed in HCCC 5/2001 are not similar to those canvassed here as the court, has not given a final determination on how the matrimonial property is to be subdivided.

(iii) Parties are not litigating under the same title, as the 2nd defendant herein was the petitioner, while the plaintiff herein was the respondent or defendant.

(iv) The issues are also different in that in HCCC 5/2001, the issue was divorce whereas the issues herein is division of money, an issue which could not be dealt with in the divorce proceedings.

In response to the plaintiff/Respondents' submissions counsel for the defendant/applicant still maintained that the doctrine of Resjudicata still operates in their favour.

On the courts', assessment of the Rival arguments herein, it has emerged that the said Rival Arguments have presented two fronts for determination by this court, namely the technical front and the merit front. The technical front arises because of the issues of the application subject of this ruling being undefended by reason of the plaintiff/respondent having failed to file either grounds of opposition or a replying affidavit against the same and thus paving the way for the defendant/applicant having a likely walk over against him in this contest in the first instance. In the second instance there is the issue of the competence of the application as raised by the plaintiff/respondent by reason of the defendant/applicant having cited the provisions of order VI rule 13 (1) (a) which sub rule 2 requires that it should be supported by evidence and yet the defendant/applicant herein has gone a head and filed an affidavit in support of the application. The 3rd technical aspect was not raised by the plaintiff/respondent but has been discovered by the court in the process of perusing the record in the course of drafting this ruling. It deals with the locus standi of the defendant/applicant to seek a substantive relief on the basis of the pleadings as they are on the record as found by this court, upon perusal when drafting of this ruling. Whereas on the other hand the merit aspect simply deals with the question as to whether the application as presented by the defendant/applicant is meritorious and should be sustained or whether the same has been ousted by the plaintiff/respondents opposition arguments and the same should be dismissed.

In this court's opinion, it is better to address the technical aspects first because if these succeed then there will be no need to interrogate the merits of the application. Turning to the first technical aspect, it is common ground that indeed the plaintiff/respondent did not file either

grounds of opposition or replying affidavit in opposition to the application. As to whether this operates against them depends on the construction of the provisions of law under which the requirement for filing of the same is provided for. These are non other than the provisions of order 50 rule 16 CPR which reads;-

"*Order 50 rule 16 (1) Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition, if any not less than three clear days before the date of hearing.*

(2) Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under sub rule (1) may with the leave of the court, file a supplementary affidavit.

(3) If a respondent fails to file a replying affidavit or a statement of grounds of opposition, the application may be heard exparte"

This court has construed this provision on numerous other occasions in the course of the discharge of its judicial functions, and has always come to the conclusion that failure of an opposing party to file grounds of opposition or a replying affidavit does not give the applying party a walk over in his/her application. Neither does it leave the defaulting party remediless. The provision of order 50 rule 16 (3) CPR is called into play to allow the court, exercise its discretion in either allowing the defaulting party to address the court, on the application or allow the applicant to proceed exparte. It has now become trite that such an address has to be limited to issue of law only. The fore going being the case, it follows that the court, rightly allowed the plaintiff/respondents' counsel to make oral representations. However the extend to which these will be applied to the arguments herein will depend on whether the issues raised touch on points of law or facts. Where the oral representations touch on points of law these are to be considered in the assessment. Whereas where they raise facts, these are to be disallowed as facts can only be presented to court, through a replying affidavit. For this reason, the court, makes a finding that the defendant/applicants application subject of this ruling is not un opposed.

As regards the competence of the defendant/applicant's application subject of this ruling, it is evident that issue has arisen because of the requirement found in order VI rule 13 (2) of the CPR that order 13 (1) (a) is not to be supported by evidence and yet herein, the defendant/applicant has cited it among others and then gone a head and filed a supporting affidavit.

As a result of the application dated 24th day of October 2008 and filed on 31st October 2008, shows that it is brought under order VI rule 13(a) and (b) and (d) of the CPR. A proper citing should read order VI rule 13 (1) (a) (b) and (d). The provision reads:-

"*Order VI rule 13 (1) at any stage of the proceedings the court, may order to be struck out or amended any pleading on the ground that:-*

(a) It discloses no reasonable cause of action or defence

(b) It is scandalous, frivolous or vexatious or

(c) It may prejudice, embarrass, or delay the fair trial of the action, or

(d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgement to be entered accordingly as the case may be.

(2) No evidence shall be admissible on an application under sub rule (1) (a) but the application shall state concisely the grounds on which it is made.

(3) ……..”

This court, has construed this provision on numerous occasions in the course of the discharge of its judicial function. It has revisited the same in the course of the drafting of this ruling and holds the same view as previously held that the use of the word “or” means that the litigant has an election to choose which of the grounds set out in the said provision is the appropriate weapon to fault the opponents pleadings, in the first instance, and in the second instance, indeed order VI rule 13 (2) provides that no evidence shall be admissible on an application under sub rule 1 (a) which should be read to mean that the rule operates only where order VI rule 13 (1) (a) has been cited as the sole ground for faulting the opponents pleadings. However where order VI rule 13 (1) (a) has been cited in conjunction with other grounds, like in this case where grounds (b) and (d) have also been cited a party cannot be faulted for putting in affidavit evidence in addition to the grounds in the body of the application as was done by the defendant/applicant herein. For the reasons given in the assessment on this point, the objection raised by the plaintiff/respondent as regards the competence of the application subject of this ruling has been ousted.

Turning to the issue of locus standi for the defendant/applicant to receive an invitation to gain locus standi to participate in these proceedings, the court, has judicial notice of the fact that on the basis of the original proceedings initiated herein, the plaintiff/respondent had two option, through which he could have placed an invitation to the defendant/applicant to participate in these proceedings. The first a venue is through the order 50 rule 16 CPR procedures whereby a plaint is filed simultaneously with the filing of an interim application for issuance of an interim relief. Indeed it is on record that this avenue was employed by the plaintiff/respondent in that he filed a plaint simultaneously with the filing of an interim application seeking interim reliefs. Indeed the defendant/respondent was duly invited to participate in the interim proceedings by being served with the plaint and the interim application. It is also on record that the defendant/applicant duly responded to that in vitation by filing a replying affidavit deponed by one Judith A. Guserwa on the 20th day of May 2004 and filed on the 25th day of May 2004. As mentioned that avenue has not been exhausted as the application is still pending.

The second avenue through which an invitation could flow through is through the order IV, XVIII, IX and IXA CPR procedures. These relate to the service of the plaint, summons, entry of appearance and filing of the defence. Applying that to the arguments herein, it is clear that indeed the plaint was served along side the interim application. The summons to enter appearance traced on the record are dated 26th day of April 2004. This court, has not however traced a return of service evidencing the service of those summons. There is no entry of appearance on the record nor a defence.

The first application which had been dated 6th day of April 2006 and filed on the 13th day of April 2006 does not mention both in the grounds in the body of the application and grounds in the supporting affidavit that summons had been taken out, served and in response there to had entered appearance and filed a defence even under protest. Likewise the second application dated 24th day of October 2008 and filed on 31st day of October does not also mention service of summons, entry of appearance and filing of defence. The fore going being the position, the question arises as to whether the defendant/applicant had locus standi to apply for a substantive relief namely striking out of the plaint.

This court, has in the course of the discharge of its judicial functions made a pronouncement on this issue in previous decisions. A decision in point is the case of **ALLIANCE MEDIA KENYA LIMITED VERSUS ALL OUTDOOR KENYA LIMITED**

AND

AL OUT DOOR KENYA LIMITED

VERSUS

ALLIANCE MEDIA KENYA LIMITED AND MOTOR CARE LIMITED NAIROBI HCCC 748 OF 2005 decided by this court, on the 24th July 2009. Case law on the subject is discussed in the said ruling stating at page 31. At page 35 of the said ruling line 1 from the bottom there is quoted the case of **FON VILLE VERSUS KELLY AND OTHERS (1995) LLR 263 (HCK)** decided by Githinji J as he then was (now JA). At page 36, line 3 from the bottom there is an observation that:- "*It was observed that notice of appointment of advocate was made under protest, defence filed under protest and application for stay or striking out the suit was made and the defendant thereby challenged the jurisdiction of the court*"

At page 64 of the said ruling there is drawn out points for determination point 3 reads:-

"*3 what is the nature of the locus standi gained by the original defendant upon filing appearance and defence under protest and a counter claim".* Where as at page 48 line 5 from the bottom observation had been made under item 2 that:-

"*2 It was apparent that no summons to enter appearance were ever taken out and served*"

At page 55 line 3 from the top this court, made the following observation:

"*The question that the court, may ask itself at this juncture is the nature of the locus standi of the original defendant. In this court,s. view, the nature of the locus standi gained by the original defendant herein is the one donated by the provisionS of order 50 rule 16 (1) CPR which reads;-------"*

This courts' construction of this provision is that the original defendant received invitation to participate in the interim proceedings. This participation could be through order 50 rule 16 (1) where a replying affidavit is filed in opposition to the application or through order 50 rule 16 (3) whereby no replying affidavit is made and the respondent could be allowed with leave of the court, to oppose the application on the basis of points of law only. Once the interim application was disposed off, the original defendant's locus standi in the matter save for the matters incidental to and connected to the interim application was kept in abeyance.

*If however the original defendant intended to take any substantive steps in the matter, then they had no alternative but to do what Githinji J as he then was (now JA) stated in the case of **FON VILLE VERSUS KELLY 111 AND OTHERSS (SUPRA)"***

At page 67 line 3 from the bottom the following observation was made:- "*As regards the nature of the locus standi gained by the original defendant, when they entered appearance and filed a defence under protest, followed by a counter claim. It is on record that this court, found as a fact that it is on record that the only invitation to the original defendant to participate in these proceedings was the invitation donated by order 50 rule 16 CPR, which invitation is limited to the participation in the interim proceedings only.*

As found by this court, if they needed to take any substantive proceedings or action on the matter, they had to enter an appearance under protest. As demonstrated by case law cited by Githinji J as he then was (now JA) in Fon ville case (supra), there is no legal provision allowing entry of appearance under protest but it is a practice condoned by the courts for long time, which has become acceptable and raises no eye brows. Here it was necessary to enable the defence take procedural steps herein as demonstrated"

This court, has revisited this issue and still holds the same view that where summons to enter appearance have not been served and no entry of appearance entered either a lone or with filing and service of defence but where a plaint has been served simultaneously with an interim application, the respondents invitation to participate in the proceedings is limited to the order 50

rule 16 CPR procedures namely to file a replying affidavit or grounds of opposition. Herein a replying affidavit was filed.

If however the 2nd defendant wished to take any substantive action in the matter as she did, then she was obligated to enter an appearance under protest and on the basis of that locus standi, file an application for striking out of the suit. This being the case, the application dated 24th day of October 2008 stands faulted on a point of technicality. For this reason there is no need to interrogate its merits.

For the reasons given in the assessment the court proceeds to make the following final orders:-

1. Failure of the plaintiff/Respondent to file either a replying affidavit or grounds of opposition in response to the 2nd defendants application subject of this ruling, does not make that application to be undefended as there is room for the court to allow the defaulting party address the court, under the provisions of order 50 rule 16 (3) CPR limited to points of law only. This means that only points of law raised on the plaintiff/respondents oral representation are to be taken into consideration when assessing the merits of the application.

2. The second defendants' application dated 24th day of October 2008 and filed on 31st day of October 2008 is not incompetent by reason of it having been supported by both grounds in the body of the application and a supporting affidavit, because the order VI rule 13 (2) requirements only applies where the applicant has cited only order VI rule 13 (1) (a) as the only ground raised for faulting the opponents pleadings. It does not apply like in this case where other grounds have been raised in addition to ground (a).

3. A perusal of the record reveals that the plaint filed herein was filed simultaneously with the filing of an interim application. The interim application invited the defendant/applicant to participate in the said interim proceedings through locus standi, through the order 50 rule 16 procedures, which procedure limited the defendant/applicant to the filing of a replying affidavit or grounds of opposition only. If the said applicant/defendant desired to take only other substantive action in the matter, this could only be done on the basis of locus standi gained through entry of an appearance under protest filed either alone or accompanied by a defence also under protest. In the absence of such a step having been taken, the subject application of 24/10/2008 and filed on 31/10/2008 was filed without jurisdiction and therefore null and void abinitio.

4. By reason of what has been stated above, there is no need to go into the merits of the said application and the same being null and void, it is struck out with costs to the respondent to it.

5. The defendant/applicant is at liberty to regularize her position and then seek a decision on the merits of the same.

DATED, READ AND DELIVERED AT NAIROBI THIS 19TH DAY .OF NOVEMBER 2009.

R.N. NAMBUYE

JUDGE