



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 62 of 2006

S.W.....PLAINTIFF

VERSUS

S.W.....DEFENDANT

RULING

A perusal of the record reveals that the proceedings herein were originated by an originating summons dated 22nd November 2006 and filed on the 23rd day of November 2006. It is presented under the married women property Act 1882, and section 3 (1) of judicature Act chapter 8 of the laws of Kenya.

On the said originating summons, the plaintiff/applicant has anchored an application dated 26th day of November 2007 and filed the same date. A reading of its heading reveals that it is brought under sections 25 (2) (3) (5), 26 (1) (2) 30 (2) and 32 of the matrimonial causes Act cap 152, section 17 of the married women property Act, rule 3 (2) and 54 of the matrimonial causes Rules, order XXXIX rules 1 and 2 civil procedure rules, section 3A of the civil procedure Act chapter 21 laws of Kenya and all other enabling provisions of the law. A total of 4 prayers are sought namely:-

1. *That the application herein be and is hereby certified as urgent, service be and is hereby dispensed with.*
2. *That the applicant be and is hereby authorized to collect rent proceeds from house number two (2) on LR, NO. 1870/111/300 West lands to cater for her maintenance.*
3. *That in the alternative the respondent be and is hereby ordered to pay the applicant Kshs. 60,000.00 monthly towards her maintenance pending the hearing and determination of this cause.*
4. *That cost of the application be provided for.*

The application is pending hearing. The Respondent has raised a preliminary objection to the same, dated 1st October 2009 and filed on 2nd October 2009. It raises three objections namely:-

1. *This Honourable court, lacks jurisdiction to grant the orders sought under section 17 of the married womens property Act.*
2. *This Honourable court, lacks jurisdiction to grant orders under sections 25, 26, 30 or 32 of the matrimonial courses Act in this suit brought under section 17 of the married women property Act.*

3. *The application is totally defective and irredeemably incompetent and should be struck out in limine.*

In his oral highlights in support of the said objection, learned counsel simply reiterated the grounds and then stressed the following:-

- There is no jurisdiction to order maintenance in a suit commenced under section 17 of the married women Property Act, as the said Act specifically caters for suits dealing with distribution of matrimonial property.
- Matrimonial causes Act cap 152 laws of Kenya also does not aid the applicant as it specifies the nature of proceedings and or claims that can be presented to court under it as provided for in sections 8,13- 16, 17-19 and 2-21.
- These claims are limited to judicial separation, maintenance pending finalization of either judicial separation or divorce proceedings and restitution of conjugal rights, provision of maintenance after divorce since proceedings have been concluded and final orders made, the right to maintenance does not arise. This being the case the applicant stands non suited under the said provisions of law after conclusion of divorce cause No.[.....].
- Concede that indeed maintenance pending divorce had been ordered therein. There was no jurisdiction to order continuance of the same after pronouncement of divorce without an order to that effect pronounced either at the time of making a pronouncement upon divorce, or after the said divorce but in the same divorce cause.
- Maintain that section 17 of the married women property Act does not aid the applicant as it deals with issues of title or possession but not maintenance which are usually pronounced upon at the end of the trial.
- Any interim relief in so far section 17 of the 1882 married women property Act is concerned is limited to preservative orders.
- That for the reasons given above the said application is a proper candidate for striking out.

In response the plaintiffs' counsel countered the objection on the following points:-

- Maintains that they are properly before this court, because the proviso to section 25 of the matrimonial causes Act provides for provision of maintenance after divorce.
- It is their stand that section 17 of the married women property Act does not say that a party cannot seek maintenance through its procedures. For this reason the court, is urged to dismiss the objections.

In response to that submission counsel for the objector urged the court, to be guided by case law on the subject which were not commented upon and it is their stand that they state the correct position in law.

- Still maintains that section 25 (2) of the matrimonial causes Act is limited to suits under the said Act of which the current suit is not.
- Still maintains that sections 17 of the married women property Act is limited to declarations and not maintenance.
- That the authority cited by the plaintiff has no relevance and they should be ignored.

On case law the court, was referred to the case of **KAMORE VERSUS KAMORE (1998) LLR 714 (CAK)** in which the law Lords of the CA referred with approval the decision of Lord Upjohn and lord Diplock in the case of **PETTIT VERSUS PETTIT**. The central theme in both is that "section 17 of the 1882 married women property rights is simply a procedural section, which provides a summary and in

forum in disputes relating to questions of title to property between husband and wife whether still married or divorced.

The case of **ESSA VERSUS ESSA (1995) LLR 384 (CAK)** where it was held inter alia that “*the aim of section 17 of the Act is to determine questions of title to property not to give the judge discretion to pass property from one spouse to another based on their work, conduct or activities.*”

The case of **HYMAN VERSUS HYMAN (1929) ALL ER 245** where it was held inter alia that “*the power of the supreme court, among others under section 19 (2) of the matrimonial causes Act 1950, to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree, such a dissolution conferred not merely in the interests of the wife, but also of the public and a wife cannot by her own covenant in a deed of separation preclude herself from invoking the jurisdiction of the court, or preclude the court, from the exercise of that jurisdiction.*”

On the courts’, assessment of the facts herein, it is clear that the following facts are not in dispute namely:-

1. That the disputants herein were at some points in their lives man and wife.
2. That there exists a divorce cause number [.....] between them.
3. That their divorce proceedings have been finalized and both decree nisi and absolute have been pronounced.
4. That by reason of what has been stated in number three (3) above, the disputants are no longer husband and wife
5. That the pleading herein is an originating summons presented to court, under the provisions of the section 17 of the 1882 married women property Act of England.
6. That the legislation mentioned in number (5) above is applicable in this jurisdiction by reason of the provisions of section 3 of the Judicature Act cap 8 laws of Kenya.
7. That the operation of the said section in so far as married women property rights and or its operation in so far as resolution of disputes between man and wife whether before or after dissolution of marriage is concerned has been settled by case law emanating from the court of Appeal decisions and as dutifully followed by the superior courts.
8. That the application objected to seeks maintenance from rental proceeds on the property subject of these proceedings pending disposal of the suit.
9. That the avenue for accessing the said relief cited by the applicant in the application objected to has been stated to be the matrimonial causes Act cap 152 provisions and the section 17 of the 1882 married women property Act of England.
10. That the gist of the rival arguments herein is that the objector says both the relief and avenues are not available to the applicant in the manner sought. Whereas the plaintiff who is responding to the objection asserts that both the relief and procedures are available to her in the manner and procedure employed.

The foregoing being the case, then the points for determination by this court are as follows:-

- (a) Whether the objection as presented is competent by reason of the objection being misdescribed in its heading by not indicating which party is objecting and which party is not objecting.
- (b) Whether the objections laid satisfy the ingredients of a preliminary objection.

(c) Whether in view of the courts', answer to the question in (b) above, the court, has jurisdiction to entertain the objection proceedings.

(d) Whether the provisions of the matrimonial causes Act cap 152 laws of Kenya relied upon by the plaintiff are available to the applicant to enable her anchor her relief on the same after the dissolution of the marriage.

(e) Whether section 17 of the 1882 married women property Act of England applied to Kenya through the provisions of section 3 of the judicature Act cap 8 laws of Kenya, can provide anchor for an application for the granting of an interim relief of maintenance pending determination of the rights of the disputants as regards the title and possession of the said property.

As regards the competence of the preliminary objection, the court is satisfied that the same is misdescribed in its heading as it does not show which party is objecting and which one is responding to the objection. This court, has ruled severally on numerous rulings that a misdescribed process is an incompetent one and a proper candidate for striking out. This court, still holds the same view with the result that the preliminary objection dated 6th day of October 2009 and filed on 7th day of October 2009 stand faulted and a proper candidate for striking out and is duly struck out.

The question that arises is whether the striking out of the misdescribed objection marks the end of the objection proceedings. The answer to the question is in the negative. The reason being that there is no really clear procedure on how a preliminary objection should be raised. Case law that this court, has judicial notice of simply, says that a preliminary objection can be raised at any stage of the proceedings, orally or formally. The formal nature is simply to alert the opposite party of the nature, content and extend of the objection. It therefore means that where written objection has been faulted, that faulting cannot operate to deny the existence of the objection in its oral form on the record. This being the case it means that the faulting of the written objection does not operate to deny the objector a ruling on the merits on the basis of the oral objections on the grounds. It is therefore safe to proceed and make pronouncement on the merits of the said objections. As to whether the objection raised satisfy the ingredients for sustaining preliminary objection, the court, is of the opinion that the law for determining this has now crystalized. It is now trite that the yardstick is found in the famous case of **MUKISA BISCUIT MANUFACTURING COMPANY LIMITED VERSUS WEST END DISTRIBUTORS LIMITED (1969) EA 696**. At page 700 Law JA as he then was had this to say at paragraph D -F:- “ so far as a I am aware of preliminary objection consists of points of law which have been pleaded or which arise by clear implication out of pleadings and which if argued as a preliminary point may dispose off the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

Sir Charles Newbold. P in the same decision at page 701 paragraph B-C had this to say:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued as the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.....

Applying the afore set out ingredients to the objections raised herein as reflected on the record in the form of objection, the court, is satisfied that the centrol theme in the said objection has to do with issue as to whether this court, has jurisdiction to grant the relief sought and this is a purely point of law. It is therefore proper for this court to proceed to interrogate that issue on its own merits.

As to whether the court, has jurisdiction to entertain the interim proceeding or not, the applicable guiding principle on how to go about issue of jurisdiction have now been established by the CA in the case of **LILIANS VERSUS CALTEX OIL (K) LIMITED (1989) EA 1653 (CAK)** where it was held interalia that:-

“Jurisdiction is everything. Without it, a court, has no power to make one step. Where a court, has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court, of

law down tools in respect of a matter before it, the moment it holds the opinion that it is without jurisdiction.....By jurisdiction is meantt the authority which a court, has to decide matters that are litigated before it or to take cognizance of the matters presented in a formally way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court, is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the extend and nature of the actions and matters of which the particular court, has cognizance or as to the area over which the jurisdiction should extend or it may partake or both of those characteristics”.

As regards the extend to which section 3A of the CPA operates to aid a litigant, case law emanating from the CA and as dutifully followed by the superior court, provide a yardstick to be followed herein. There is the case of **WANJAU VERSUS MURAYA 1983 KLR 276** where Kneller JA as he then was held interalia that:-

*“Section 3A of the civil procedure Act cap 21 although saving the inherent powers of the court, to make such orders as may be necessary for the ends of justice or to prevent the abuse of the power of the court, should not be cited where there is an appropriate section or order and rule to cover the relief sought. Also the case of **MEDITERANEAN SHIPPING COMPANY S.A. VERSUS INTERNATIONAL AGRICULTURAL ENTERPRISES LIMITED ETCO (MSA) LIMITED (1990) KLR 183** where it was also held interalia that:-*

“It is now trite law that the inherent jurisdiction of the court, should not be invoked where there is specific statutory provisions which would meet the necessary of the case.

*(2) Section 3A of the civil procedure Act, ought not to be called into the aid of a litigant in all situations not specifically legislated for. It all depends on the circumstances of each case. And lastly there is the case of **TANGUS VERSUS ROITEL (1968) EA 618** where it was held interalia that “the courts’, inherent jurisdiction should not be invoked where there was a specific statutory provision to meet the case.*

Applying these case law principles to the rival arguments herein, it is the opinion of this court, that three questions have arisen for determination namely:-

1. Do the issues raised in the preliminary objection satisfy the ingredients required for the sustaining of a preliminary objection?
2. On the basis of the facts demonstrated by the rival arguments, do issues of jurisdiction arise herein? If so how does the court intend to deal with the same?
3. Is this a proper case where the courts’, inherent jurisdiction can be called into play to aid the applicant to unseat the objection raised.?

In answer to question 1, the court, is of the opinion that the yardstick to be applied is that set by the CA in the Mukisa case (supra). These ingredients have been applied to the facts and the rival arguments herein and the court, is satisfied that the preliminary objection raised by the objector is substantially sustainable by reason of it touching on the jurisdiction of the court. Whether the court, has jurisdiction to grant the relief being sought. The court, is also satisfied that it has jurisdiction to pronounce on the merits of the preliminary objection which merits will be gone into when determining as to whether the court, has jurisdiction to grant the relief sought or not.

As regards the issue of the invocation of the inherent jurisdiction of the court, the case law cited is explicit that the jurisdiction to invoke and apply the same is limited to only situations where there is no other avenue provided through which the applicant can pass to access relief from the seat of justice. This too will be decided along side the decision as to whether the court, has jurisdiction to grant the relief being sought or not.

Turning to the merits of the said application, it is clear that there is no dispute that the applicant seeks to access the said relief via section 25 (2), (3), (5) section 26 (1) (2), section 30 (2) and 32 of the matrimonial causes Act cap 152 laws of Kenya, section 17 of the married women property Act. Rule 3 (2) and 54 of the matrimonial causes rules, order XXXIX rules 1 and 2 of the CPR, section 3A of the CPA and all other enabling provisions of the law. These provisions read:-

“Section 25 (2) the court may, if it thinks on any decree for divorce or nullity of marriage order that the husband shall to the satisfaction of the court, secure to the wife, such gross sum of money, or annual sum of money for any term not exceeding her life as having regard to her fortune, if any to the ability of her husband and to the conduct of the parties, the court, may deem to be reasonable.

(3) In any such case as a foresaid the court may, if it thinks fit by order, either in addition to or instead of an order under subsection (2) of this section, direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the court, may think reasonable provided that-

(i) if the husband, after any such order has been made, becomes from any cause unable to make the payments, the court, may discharge or modify the order, or temporarily suspend the order as to the whole or any part of the money ordered to be paid and subsequently revive it wholly or in part as the court thinks fit and

(ii) Where the court, has made any such order as is mentioned in this subsection and the court, is satisfied that the means of the husband have increased, the court may, if it thinks fit increase the amount payable under the order.

(5) In all cases where the court, may make an order for alimony , the court, may direct the alimony to be paid either to the wife or to a trustee approved by the court, on her behalf and may impose such terms or restrictions as the court, thinks expedient, any money from time to time, appoint a new trustee if for any reason it appears to the court, expedient so to do.

Section 26 (1) where a husband has been guilty of willful neglect to provide reasonable maintenance for his wife or the infant children of the marriage, the court if it would have jurisdiction to entertain proceedings by the wife for judicial separation, may on the application of the wife, order the husband to make to her such periodical payments as may be just and the order may be enforced in the same manner as an order for alimony in proceedings for judicial separation.

(2) Where the court, makes an order under this section for periodical payments, may, if it thinks fit order that the husband, shall to the satisfaction of the court, secure to the wife the periodical payments, and for that purpose may direct that a proper deed or instrument to be executed by all necessary parties shall be settled and approved by the court”

“Section 30 (2), on an application made in that behalf, the court, may, at any time before final decree in any proceedings for restitution of conjugal rights, or if the respondent fails to comply there with, after final decree, make from time to time all such orders and provisions with respect to custody, maintenance and Education of the children of the petitioner and respondent as right have been made by interim orders if proceedings for judicial separation had been pending between the same parties.

Section 32 the court, may from time to time vary or modify any order for the periodical payments of money made under this Act either by altering the times of payment or by increasing or diminishing the amount or may temporarily suspend the order as to the whole or any part of the money ordered to be paid and subsequently revive it wholly or in part as the court thinks just”

Matrimonial cause’s rule 3(2) and 54 were also relied upon. This court, has on its own construed the above set out provisions of the law and construed them in the light of the rival arguments herein and proceeds to make the following findings:-

1. The amount envisaged to be paid under the provisions of section 25 (2) is only available to a litigant who is a beneficiary or a victim of a decree of divorce or nullity of the marriage.
2. The beneficiary of the orders envisaged in section 25 (3) is a party who is either still living jointly with his or her spouse or is separated, where upon the husband would be ordered to make provision for monthly or weakly maintenance for the wife with power to discharge and or vary such orders as the prevailing circumstances in each case permit.
3. Section 25 (5) makes provision for payment of alimony to the wife.
4. Section 26 (1) deals with maintenance for neglected children of the marriage. Whereas section 26 (2) on the other hand simply enjoins the court, to ensure that orders made under section 26 (1) are not faulted but obeyed.
5. Section 30 (2) on the other hand deals with the courts' jurisdiction to make orders for provision of maintenance either before or after the working of a decree on restitution of conjugal rights.
6. Whereas section 32 donates general power to the court, to vary from time to time any orders made under the Act as regards maintenance with power to discharge vary or suspend the same.
7. Rule 3 (2) of the matrimonial causes rules simply makes provision for the mode of application for ancillary relief namely application for alimony pending suit, maintenance of the children of the marriage, periodical payments by a husband to wife in whose favour a decree for restitution of conjugal rights has been made or periodical payments by a wife against whom such a decree has been made of part of any profits of trade, or earnings of which she is in receipt of her husband for his own benefit, or to her husband, or any other person for the benefit of the children, the allotment of alimony to a wife in whose favour a decree of restitution of conjugal rights has been made, or in whose favour, or against whom a decree for judicial separation has been made, or to a husband where the wife has presented a petition for judicial separation, the payment by a husband on a decree for divorce, or nullity of marriage of monthly or weakly sums for the maintenance and support of his wife, or by a wife where she has presented a petition for divorce on the grounds of her husbands, or monthly or weekly sums for his maintenance and support, the discharge, modification or temporary suspension of an order for periodical payments securing periodical payments to a wife, alimony pending suit, permanent alimony, maintenance for wife or maintenance for the children, the securing by a husband on a decree for divorce or nullity, of a gross or annual sum of money to his wife, or for the benefit of the children of the marriage, the application of the whole or any part of the property comprised in any on the nuptial settlement made on the spouses either for the benefit of the children of the marriage or of the spouses, and lastly the settlement in the case of a decree for divorce or judicial separation by reason of the adultery, desertion or cruelty of the wife or for restitution of conjugal rights, the wife of the property to which she is entitled either in possession or in reversion or any part thereof for the benefit of her husband. The application for the afore mentioned reliefs are to be in form number 2.
8. Rule 54 on the other hand simply makes provision for the service of the summons to the opposite party at least one day before the returnable date.
9. Section 17 of the 1882 married women property Act on the other hand makes the following provisions:-

“17 in any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation company, public body, or society as afore said, in whose books any stocks, funds or shares of either party are standing may apply by summons or otherwise in a given way to any judge of the high court etc of justice in Englandmay make such order with respect to the property in dispute and as to the costs of and consequent on the application as he thinks fit or may direct such application to stand over from time to time and any inquiry touching the matter in question to be made in such manner as he shall think fit.

10. Order 39 rules 1 and 2 relates to the granting of the injunctive relief, may it be interlocutory or mandatory.

The afore set out provisions of law have been applied to the rival arguments herein and the court, proceeds to make the findings that the following facts do not seem to be in dispute:-

1. That the disputants herein were man and wife but have since divorced.
2. It is apparent that there was no provision made for payment of alimony pendente lite or any provision made for either lumpsum or periodical payment of maintenance to the wife after the pronouncement of the divorce decree.
3. That the provisions of law set out above drawn from the matrimonial causes Act cap 152, laws of Kenya, makes provision for the payment of maintenance for the wife both during the pendency of the separation or divorce proceeding as well as after the pronouncement of the divorce decree.
4. There is also jurisdiction to revisit that issue in the divorce proceedings even after the decree of divorce has been pronounced.
5. There is no dispute that the petitioner applicant has sought access to the seat of justice herein through the section 17 of the married women property Act procedures by way of a petition for division of property.
6. There is no dispute that it is on the basis of this petition, that she has anchored an application seeking the courts', leave to be allowed to be paid an amount of Kshs. 60,000 monthly for maintenance or in the alternative she be allowed to collect rent from the subject proceedings.
7. There is no dispute that she has also invoked the inherent jurisdiction of the court, which jurisdiction case law cited herein has established that it is only available where there is no other provision of law through which a litigant can invoke to access the seat of justice.
8. That a reading of the provisions of law of both legislation namely the matrimonial causes Act and the section 17 of the married women property Act, tends to demonstrate that issue of maintenance at whatever stage of the marriage, between the disputants should and has to be governed by the provisions of the married women property Act. Whereas issues of division of property between spouses either during coverture or after coverture is governed by section 17 of the married women property Act 1882 of England.
9. That a proper construction of the provision of section 17 of the married women Act 1882 of England has to bear in mind the central command in the said section which is found at the start of the same section and it is found in the following words:- "*In any question between husband and wife as to the title to or possession of property either party or May apply by summons.....and the court may make such order with respect to the property in dispute and as to the costs.....*" there is no provision for an interim order.
10. A proper construction of the provisions of the matrimonial cause Act cap 152 laws of Kenya, and the section 17 of the married women property Act 1882 of England do not import the other into their procedures.
11. Case law cited herein does not provide a basis for the importation of either provision into proceedings originated under either of them.
12. It is not disputed that both case law and a reading of the section 17 confirm that the applicable law and procedure for dealing with regard to property as between married man and woman either during coverture or after is the section 17 of the married women property Act 1882 of England.

13. That no case law has been cited to this court by either party neither is there any that this court, has judicial notice of in the cause of its judicial function which makes provision for the existence of the two procedures.

When the above findings are applied to the rival arguments herein, the court, is satisfied that although the applicant may be having a genuine complaint, meriting interrogation, she has directed it to the wrong forum. She should go back to the divorce proceedings under the relevant rules and seek maintenance. Herein the only relief that she can pursue is the division or possession of the suit property and not maintenance. The court therefore proceeds to make the following final orders:-

1. That the preliminary objection raised by the objector satisfies the ingredients for raising and sustaining a preliminary objection in terms of the principles laid out in the Mukisa Biscuit case (Supra)
2. That the objectors lack of jurisdiction both to entertain and grant the relief sought is a pure point of law and if upheld it will dispose off the interim application.
3. That the said preliminary objection on lack of jurisdiction be and is hereby upheld because:-
 - (i) Indeed the disputants were man and wife but have since been divorced.
 - (ii) That the divorce proceedings were governed and determined in accordance with the provisions of the matrimonial causes Act cap 152 laws of Kenya.
 - (iii) That under the matrimonial causes Act provisions there is jurisdiction to make orders for maintenance of either spouse during and after the divorce proceedings.
 - (iv) That no such maintenance orders were granted in favour of the applicant herein.
 - (v) That the construction of the provisions of the matrimonial causes Act cap 152 laws of Kenya relied upon by the applicant leaves no doubt that the solely govern proceedings commenced under the said Act.
 - (vi) That the proceedings herein were commenced under the section 17 of the married women property Act of 1882 England.
 - (vii) That the construction of the said provision by this court, set out herein, reveals that the control command in the said provision is that the court, is mandated to deal with issues of possession and or subdivision of matrimonial property either during marriage or after dissolution of the marriage.
 - (viii) That there is no jurisdiction to order interim relief in terms of maintenance orders from the earnings of the matrimonial property pending hearing and determination of the possession and ownership rights of the disputants unless if these are by way of consent of the parties and of their own volition.
 - (ix) That there is no jurisdiction to import the section 17 of the 1882 married women property Act of England into those of the matrimonial causes Act cap 152 laws of Kenya. Likewise there is no jurisdiction to import the cap 152 (laws of Kenya) procedures into those of the section 17 procedures.
4. By reason of what has been stated in No. 3 (I)-IX above, the preliminary objection dated 1st day of October 2009 though struck out an account of it being misdescribed, the striking out of the misdescribed preliminary objection did not operate to affect the oral objection made on the record which can exist on their own and can be ruled upon on their merits because there is no laid down procedure on how a preliminary objection should be presented. Meaning that oral representations made in court on the basis of struck out misdescribed written objection survives the axe and the same can be ruled upon on its own merits. These raised here in have been considered on their merits and the same is found to be meritorious and has been upheld.

5. By reason of what has been stated in number 4 above the application dated 26th day of November 2007 be and is hereby struck out.
6. The respondent objector will have cost of the struck out application as well as the oral version of the preliminary objection.
7. The only remedy available to the applicant is to take priority dates for the hearing and disposal of the main cause or alternatively secure a consent from the opposite party to that effect.
8. The only other relief available to the applicant is a preservatory order to preserve the earnings pending disposal of the matter if she so wishes, an issue the court has not been asked to adjudicate and rate upon at this juncture.

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

R.N. NAMBUYE

JUDGE