



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

Civil Suit 24 of 2004 (OS)

SARAH WAMBUI NJOROGE..... APPLICANT

VERSUS

DANSON MURATHA NJOROGE.....RESPONDENT

RULING

On 02.09.04 Sarah Wambui Njoroge filed chamber summons dated 31.08.04 stated to be brought under Order XXXIX rules 1, 2 and 3 (1) of the Civil Procedure Rules; section 3A of the Civil Procedure Act, Cap.21; and rule 3 (1) of the High Court (Practice and Procedure) Rules (made under the Judicature Act, Cap.8) applying, *inter alia*, for the following orders:

‘3. THAT the respondent either by himself his servants and agents be restrained by an order of injunction from selling, transferring charging and/or disposing off the properties listed herebelow;

(a) Dagoretti/Kangemi/813 – Rental houses

(b) Dagoretti/Kangemi/T 314 – Matrimonial home plus rental houses

(c) 2 plots at Ruai Embakasi Ranching company No.F 672 part of L.R. 10904/2

(d) Motor vehicle Registration No. KAG 218L – Toyota Corolla

(e) Shares in the following companies:-

i. National Bank of Kenya

ii National Industrial Credit Bank

iii Uchumi Supermarkets

iv Kangemi Gwitu Investments Limited – plot at Kawangware

v. Kenya Airways

vi. Embakasi Ranching Company

4. THAT the rental income from the rental premises be collected by a housing agent to be appointed by this Honourable Court pending the hearing and determination of this suit.

5. THAT the respondent be restrained from interfering with the quiet enjoyment by the applicant of her matrimonial home at Kawangware (Dagoretti/Kangemi/T 314

6. THAT costs of the application be granted to the applicant.’

The ground upon which the application is based are:

- a) That the applicant is the lawful wife of the respondent.
- b) That the properties contained in paragraph 3(a) – (e) and shares held with the companies listed in paragraph (e) (i) – (vi) were acquired and registered during the subsistence of the marriage and with joint funds and efforts of both the applicant and the respondent.
- c) That the respondent has already disposed of part of the properties and intends to transfer and is likely to alienate the remaining properties unless restrained by an order of this honourable court.
- d) That the respondent has refused to account for rental income and/or assist the applicant and has further threatened to throw out the applicant from the matrimonial house at Kawangware.
- e) That the respondent is openly engaged in an affair with a mistress and using a lot of family monies on expensive philandering escapades with her and a question has now arisen as to such waste and fear of alienation of property acquired jointly with respondent.

The application is supported by the applicant’s affidavit sworn on 31.08.04.

At the hearing of the application before me, learned counsel, Mr G.M. Korongo held brief for Miss Muthoni for the applicant while there was no appearance for the respondent.

Applicants’ counsel informed the court that the respondent was served in person by Peter Mburu Kabage, that the respondent refused to sign for the service and had also failed to attend the hearing of the application. A check in the court file confirmed that there was indeed an affidavit of service by Peter Mburu Kabage, process server sworn on 28.11.07. The affidavit is to the effect that the process server did on 22.11.07 serve the respondent personally with hearing notice for 13.12.07 together with the originating summons in this case and that the respondent, whom the process server knew, accepted service but declined to sign for the service. On the basis of the above evidence of service, this court allowed the matter to proceed and applicant’s counsel prosecuted the chamber summons application dated 31.08.04.

Applicant’s counsel told the court that prayers 1 and 2 of the chamber summons were spent. He sought prayers 3,4, 5, 6 and 7. Prayer 7 is an omnibus prayer. Applicant’s counsel pointed out that the main prayer was prayer 3; and that prayer 5 relates to the matrimonial home whose quiet enjoyment by the respondent the applicant has been interfering with. Applicant’s counsel said he relied on the applicant’s supporting affidavit sworn on 31.08.04 and annexures thereto. The annexures include a sale agreement dated 05.07.83 – ‘SWN – 1’. There is also an agreement dated 23.10.2000 for sale by the respondent to Harvest Centre Fellowship Church of 0.25 acres of land out of L.R. 818 in Kangemi, Nairobi. Applicant’s counsel urged the court to grant the application dated 31.08.04.

I have duly considered the application before court.

I note from the application and its supporting documents that the applicant alludes to an extra-marital affair between the respondent and another woman who has not been specified. Applicant also sought to illustrate her fear that the respondent may dispose of what she (applicant) regards as family properties by her furnishing a sale agreement, annexure ‘SWN – 1’ to her supporting affidavit. The annexed agreement is of 05.07.83 and cites the respondent as purchaser of One Share in M/s Embakasi Ranching Co. Limited. I do not see how the respondent’s alleged purchase of the aforementioned share in Embakasi Ranching Co. Limited adversely affects the applicant. Additionally, one of the documents annexed in support of the present application relates to a purported sale on 23.10.2000 by the respondent to Harvest

Centre Fellowship Church of 0.25 acres out of L.R. 818 in Kangemi, Nairobi. As the said L.R. 818 Kangemi is not among the suit properties, I do not see how its citation helps the applicant with her application now before court.

The tenor of the present application seems to be premised on the applicant's allegation that she is the respondent's wife, that the suit properties were acquired during the subsistence of the aforesaid marriage between the parties and that, therefore, the applicant and respondent are entitled to equal shares in the said properties. In this regard, the applicant's attention is drawn to Court of Appeal Civil Appeal No.75 of 2001, Peter Mburu Echaria -vs- Priscilla Njeri Echaria which essentially held, *inter alia*, that there is no presumption that any or all property acquired during subsistence of a marriage must be treated as being jointly owned by the parties to the marriage. It appears the suit properties are registered in the respondent's name alone. On this aspect, the Court of Appeal comprising 5 Judges of Appeal held in Echaria's case (*supra*) that:

'Where the disputed property ... is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property ...'

At this interlocutory stage, there is only the applicant's version relating to acquisition and ownership of the suit properties, the respondent not having filed response to the originating summons despite service. That does not necessarily obviate the need for the applicant having to prove her claims eventually. The battle is far from being over.

Applicant's counsel described prayer 3 of the chamber summons application as the main prayer and prayer 4 as relating to the matrimonial home whose quiet enjoyment the applicant wants specifically protected. As the defendant does not seem to have deemed it fit or necessary to file or register response to the interim application before court, I hold that the applicant is entitled to at least prayers 3 and 5 on interim basis. Accordingly, I hereby grant the interim restraining orders sought vide prayers 3 and 5 of the chamber summons application dated 31.08.04 pending hearing and determination of originating summons dated 31.08.04.

Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 29th day of August, 2008.

B.P. KUBO

JUDGE