

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Cause 7 of 2008

P J KAPPLICANT/DEFENDANT

VERSUS

B D O RESPONDENT/DEFENDANT

RULING

The application before the court is a Chamber Summons dated 24.4.2008. It seeks orders to preserve what the Plaintiff/Applicant claims to be matrimonial properties, pending the hearing and final determination of this suit seeking division of the properties and another seeking dissolution of marriage in Divorce Cause No.10796 of 2007 at Milimani Chief Magistrate's Court.

The applicant relied on her supporting and further supporting affidavits. The gist of the two affidavits is that the named properties were acquired during their marriage and that they therefore belong to both jointly. That since their marriage has broken down and is likely to be dissolved, there will be a necessity to divide the properties as sought in this cause. Hence the need to preserve the said properties until the divorce suit and this suit for division of the properties are finally decided.

The application was orally opposed by the Respondent/Defendant who purported to rely on his replying affidavit. The Respondent did not state who swore the replying affidavit or when it was sworn, if any such affidavit was indeed filed. The court on its part found no filed replying affidavit in the court record and observed the fact that during the hearing of this application, the counsel for the Respondent identified no such replying affidavit.

The Respondent's counsel, Mr. Korongo, had in response to Mr. Rugut's argument, opined that the application should fail because of failing to satisfy the principles of granting the injunctions. He also faulted the application for being brought under Order 39 of the Civil Procedure Rules.

I have carefully considered the application before the court. The Respondent does not deny the averments by the applicant that the properties named in this application were acquired during their marriage. He does not indicate good reasons why this court should not preserve the properties so that they can later be considered for division between the parties, if at all, in ratios to be proved by each party on evidence.

Furthermore although the applicant may have approached this court under O.39 of Civil Procedure Rule, I have no hesitation in concluding that she has shown a case to the effect that unless the properties are preserved, she is bound to suffer irreparable or serious loss if she later proves her case for fair distribution of the properties only to find that such properties have been already disposed off. Nor did the Respondent deny the allegations by the applicant that he has hidden a motor vehicle No. KAP 592 V with a view to dispose of it or that he intends to dispose some or all of the listed properties.

Finally, in the circumstances of this case where the Respondent did not file a replying affidavit or a statement of grounds of opposition, can be and are hereby presumed to mean that this application was not intended to be opposed. The conclusion I accordingly reach is that the applicant has persuaded the court adequately that she is entitled to the orders sought whether it is under Order 39 of the Civil Procedure

Rule or under Rule 73 of the Probate and Administration Rules. I accordingly allow this application and order for the issue of injunctions as sought in the application. Costs are to the applicant. Orders accordingly.

Dated and delivered at Nairobi this 18th day of September, 2008.

D.A. ONYANCHA

JUDGE