



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 2361 of 1999 (OS)

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

AND

IN THE MATTER OF SEC. 17 OF THE MARRIED WOMEN'S

PROPERTY ACT OF 1882

MARION WANJIRU MAINA.....APPLICANT

VERSUS

STEPHEN MAINA.....RESPONDENT

RULING

Before me is a Chamber Summons dated 1/12/2006 filed by Judy Thongori & Company advocates on behalf of the applicant Marion Wanjiru Maina. The respondent is named as Stephen Maina. The application is purported to have been bought under Order 39 rules 1, 2 and 3 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The application seeks for a temporary injunction and issuance of restraining orders on several assets, pending the hearing and determination of the Chamber Summons herein. The application has grounds on the face of the Originating Summons and is also supported by the affidavit of the applicant sworn on 1st December 2006. The application is opposed.

When the application came for up hearing before me on 8/2/2007 Ms. Machio appeared for the applicant, while Mr. Njiru appeared for the respondent. Ms. Machio submitted that the application arose from an Originating Summons dated 2/12/1999 for division of matrimonial property, which was still pending. The marriage was a customary marriage. She contended that there was evidence of a marriage and the properties in question were acquired during coverture. She sought to rely on the cases of TABITHA WANGECI NDERITU –vs- SIMON NDERITU KARIUKI NAIROBI CIVIL APPEAL NO. 203 OF 1997, the case of KIVUITU –vs- KIVUITU 1991 2 KAR 241, and the case of MUTHEMBWA – vs- MUTHEMBWA – NAIROBI CIVIL APPEAL NO. 74 OF 2001.

She submitted that the applicant would suffer irreparable loss if the orders sought were not granted, as an award of damages would not be adequate compensation. She stated that the applicant had established a prima facie case with probability of success. She also submitted that the balance of convenience was in favour of the respondent. She sought to rely on the case of GEILLA –vs- CASSMAN BROWN & CO. LTD [1973] EA 358.

Mr. Njiru for the respondent opposed the application. It was his contention that the court had no jurisdiction to determine the existence of a marriage under section 17 of the Married Womens Property Act 1882 which was merely procedural section. The court also did not have jurisdiction to grant orders of injunction under Order 39 of the Civil Procedure Rules in the present proceedings. It was his submission that section 17 of the Married Womens Property Act presumed the existence of a marriage. He sought to rely on the case of OBUYA –vs- OBUYA NAIROBI HIGH COURT CIVIL CASE NO. 178 OF 1982(OS). He submitted that in all the cases cited by counsel for the applicant, there was no dispute on the existence of the marriage. In his view, a customary marriage and a presumption of a marriage had to be proved first, and that proof was already the subject of a litigation which was pending at the Milimani court.

He also submitted that an injunction could not issue under Order 39 of the Civil Procedure Rules, in proceedings under section 17 of the Married Women Property Act. In his view the existence of a marriage was not proved by affidavits or photographs.

He also stated that the applicant had not annexed documents to show that the alleged assets existed. In any event the mere fact of a male person and female person carried on business together did not establish the existence of a marriage.

I have considered the application, the documents filed and the submissions of both counsel for the parties. I have also perused the legal authorities cited to me.

The first issue that arises is whether this court has jurisdiction to entertain this application or to determine the existence of a marriage under the provisions of section 17 of the Married Womens Property Act. That section deals with the distribution of property between married people. That issue of distribution of property has to be dealt with in that motion by way of Originating Summons, not in this application before me, which is a Chamber Summons, and seeks for interlocutory orders. When there are disputes such as the ones in the Originating Summons that is pending, it will not be uncommon for people to dispute the marriage or the alleged property. However, as I have said those are matters to be resolved in the Originating Summons. I am not required to go into the substantive merits of the Originating Summons now. I hold therefore that I have jurisdiction to entertain the Chamber Summons herein.

The second issue is whether this court can issue injunctive orders under Order 39 of the Civil Procedure Rules in an action brought under Section 17 of the Married Womens Property Act. I have no hesitation in finding that the court can issue injunctive orders under Order 39 Civil Procedure Rules in proceedings under the Married Womens Property Act.

Before me is an application for restraining orders pending the hearing and determination of the Originating Summons, which is pending.

The considerations to be taken by a court in such an application were clearly stated in the often cited case of GEILLA –vs- CASSMAN BROWN & CO. LTD [1973] EA 358. Firstly, the applicant must show a prima facie case with probability of success. Secondly, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury. Thirdly, if the court is in doubt, it will decide the case on the balance of convenience.

Has the applicant herein shown a prima facie case? The applicant has sworn an affidavit giving details of their relationship with the respondent as well as businesses conducted together and alleged properties acquired during coverture. The respondent's counsel appears to oppose or dispute the allegations or technicalities. In my view, with the facts before me, the applicant has shown a prima facie case with probability of success in her claims against the defendant.

The second issue is whether the applicant will suffer irreparable loss if the orders sought are not granted. The assets are various. They comprise of land and other assets. The applicant claims to be living and farming on part of the land. It is not possible to determine the value of the assets at this time. All these put together, it is my view that if the restraining orders are not granted, the applicant will suffer

irreparable loss which cannot be adequately compensated in the form of damages.

The balance of convenience is also in favour of the applicant as she is using and farming on part of the land. The respondent has not said that he will suffer any loss, and on my part I do not see any prejudice that will be suffered by the respondent, if I grant the orders sought.

For the above reasons I allow the Chamber Summons and grant the orders sought. However costs will be in the cause.

Dated and delivered at Nairobi this 22nd day of February 2007.

George Dulu

Judge

In the presence –

Ms. Machio for the applicant

Mr. Omwenga holding brief for Mr. Njiru for the respondent