



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

Civil Case 111 of 2006

CATHERINE MASINDEPLAINTIFF

VERSUS

CHRISS MAKHANU MASINDEDEFENDANT

R U L I N G

The Applicant/Respondent filed this Notice of Motion before the submission of this originating summons started. It is dated 29th June, 2007 and is premised under section 3A, 6 and 63(e) of the Civil Procedure Act substantially.

It seeks the stay of proceedings of this originating summons till the final determination of originating summons (Nairobi) No. 29 of 2004 filed by the Applicant/Respondent against the Respondent/Applicant herein.

It is supported by grounds set forth on the face of the application and on the supporting affidavit sworn by the Applicant on 29th June, 2007.

The originating summons No. 29 of 2007 was filed by the Applicant (husband) under Section 28 of the Matrimonial Causes Act (Cap 152) and involves many properties including the Home situated on Block No.32/609 along Magiwa Estate, Nairobi.

The Applicant based this application on the earlier filing of the said originating summons which is annexed. Section 6 of Civil Procedure Act is thus totally relied upon by the Applicant, which stipulates:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation. — The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

Although it is averred from the Bar, I do not have any proof before me to show that the said originating summons was served upon the Respondent/Applicant herein.

The Applicant also relied on the case of **Niazsons (K) Ltd. v China Road & Bridge Corporation, (2001) 2 E.A. 502**. It is a decision by the Court of Appeal wherein after the parties submitted to arbitration, a preliminary objection, to the validity of the dispute resolution clause, was raised.

The court, looking at the circumstances of the case, held that the court considering an application for stay of proceedings under Section 6 of Civil Procedure Act must decide whether the party applying has taken a step in proceeding amongst other factors mentioned. It also held that the validity of the dispute resolution clause required the court to consider the merit of the stay application and thus cannot be raised as a preliminary objection.

I do not quite appreciate the reliance on the said case by the learned counsel for the Applicant/Respondent but I do note that the

objections initially raised as Preliminary Objection vide Notice of 10th July, 2007 were heard as objections to the application before me.

The objections as regards legality of several paragraphs of the supporting affidavit were also denied and finally it was urged that as the application raises an issue of law, the same should be allowed.

The application is opposed with tenacity. The learned counsel started her attack by challenging the validity of paragraphs 4, 5, 6 and 8 of supporting affidavit by contending that the information, allegedly given by a clerk in the firm of Kipkurui Nge'no & Co. advocates the erst while Advocate of the Applicant/Respondent cannot be relied upon as the name of clerk was not disclosed. Those paragraphs enumerate the facts of attempts of service on the Respondent/Applicant by the said clerk. The contents of those paragraphs are very crucial to this application to show whether the Respondent/Applicant herein was served with the earlier originating summons i.e. No. 29/04. I reiterate that I do not have anything to show the service or to support the said contentions. As the facts remain, I tend to agree that there was no service of the earlier originating summon to the Respondent/Applicant herein.

I also agree that contents of paragraph 15 of the supporting affidavit is not within the knowledge of the Applicant/Respondent.

Without going much in detail with the contents of the supporting affidavit, I do note that there is discrepancy in the contents of the supporting affidavit and the prayers sought in the application.

I also note that what the Applicant is contending now, was also placed in evidence before me in the present originating summons

It is very relevant to note that the Applicant/Respondent and his counsel were well aware of the originating summon No. 29/04 before proceeding with the present originating summon wherein the evidence was closed by both the parties. No explanation, to the delay in raising the issue of stay until the case was fixed for submissions, has been given.

As I am hearing the application inter partes, I also note from the supporting affidavit to the originating summons No. 29/04 that the main contention raised is on the plot No.32/609 and this court was heard all the respective claims by both the parties.

It was further brought to my notice, which was not disclosed by the Applicant/Respondent, that an earlier similar case being originating summon No. 3 of 2003 was struck out with costs on 30th September, 2004. (Annexures Nos. CM1 to CM7 of the replying affidavit). One of the grounds raised in those proceedings was that the suit under section 28 can only be filed under the Divorce Proceedings which were completed on 18th June, 2002.

In the circumstances of this case, I tend to agree that the present application is not a bona fide application and is an abuse of the court process. No court should permit a party to take undue advantage of a legal provision under the circumstances which are unjustified and malafide.

I thus dismiss the application dated 29th June, 2007. The costs of this application be to the Respondent/Applicant in any event.

Dated, Delivered and Signed at Nairobi this 21st day September, 2007.

K.H. RAWAL

JUDGE