



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)  
CIVIL SUIT 16 OF 2007**

**IN THE MATTER OF MARRIED WOMEN – PROPERTIES ACT OF 1887**

**NANCY WANJIRU WAIROBI ..... PETITIONER/APPLICANT**

**VERSUS**

**SYMON WAIROBI GATUMA. .... RESPONDENT**

**R U L I N G**

This ruling arises from a Notice of Preliminary Objection filed by the respondent herein and dated 13.4.2007. The preliminary objections raised include the following: -

- (a) That this main suit is similar to another suit HCCC No. 23 of 2004 which had been deliberated upon and finally decided.
- (b) That this suit should be stayed until the plaintiff pays costs in the said HCCC No. 23 of 2004.
- (c) That this suit is incurably and fatally defective, misconceived and bad in law.

The respondent argued that this suit is similar in all its prayers as HCCC No. 23 of 2004, which was withdrawn by the plaintiff therein, who is the plaintiff herein. That under that suit, the plaintiff had filed a similar application as she has filed under this suit. In particular, she had filed seeking and obtained orders re-restraining the respondent/defendant from interfering with the use of motor vehicle KAJ 676H or alienating the therein listed properties which were said to be matrimonial properties. The respondent accordingly argued through Mrs. Rashid who represented her, that since temporary orders were granted in that suit restraining the respondent from interfering with the above quoted motor vehicle or alienating the alleged matrimonial properties, then similar orders cannot be granted in this suit before this court. This is despite the fact (which the respondent admits) that HCCC No. 23 of 2004 with all orders made under it, was eventually withdrawn, to give way for this suit before the court to be filed.

On the other hand the plaintiff through Mrs. Sijeny thought and argued that this Preliminary Objection is misconceived. She pointed out that the only prayers in the HCCC No. 23 of 2004 which were repeated in this suit were prayers c, d, g, and h which concerned the division of matrimonial properties. That such prayers were withdrawn from that suit and refiled in this suit which is an independent suit which can attract its own interlocutory applications such as the one before the court. She accordingly urged that the Preliminary Objections raised, amount to no Preliminary objection and should be dismissed.

I have carefully studied the documents relied upon by both parties. Both parties agree that the issues

concerning matrimonial properties raised in HCCC No. 23 of 2004 were withdrawn and gave way to a fresh suit being filed before this court. In particular the Respondent admitted that all interlocutory orders granted in suit HCCC No. 23 of 2004, were indeed withdrawn with the withdrawn suit. How then can he at the same time say that the withdrawn orders are still effective for the purpose of the principle of Res Judicata under section 6 and 7 of the Civil Procedure Act, Cap 21?

In the view of this court, even if all the issues raised and orders given in HCCC No. 23 of 2004 were repeated in this case before the court, they would not attract the principle of Res Judicata because that suit and all interlocutory applications and orders made thereto were withdrawn. The effect of withdrawal of a suit and its consequential applications and orders is to make the same as if it never existed. To that end all interlocutory applications made under HCCC No. 23 of 2004 as well as orders made under such applications were made of non-effect the moment the suit was withdrawn. More so where, as in the HCCC No. 23 of 2004, the suit was deliberately withdrawn with open knowledge and information to all the parties concerned, that a fresh one was going to be filed.

The Respondent's argument that the restraining orders sought herein had been sought and granted in HCCC No. 23 of 2004 demonstrates lack of knowledge of the substance of the principle of Res Judicata. The raising of this Preliminary Objection amounts to a waste of court's and plaintiff's time. As stated in the famous Mukhisa's case, such waste should be penalized in costs to discourage the practice.

The final orders that commend themselves to this court are as follows: -

### **ORDERS**

1. The Preliminary Objections raised and argued herein are hereby rejected and dismissed.
2. The respondent shall pay the plaintiff's costs of this Preliminary Objection at half-day basis on the higher scale.
3. The Respondent's advocate Mrs. Rashid to pay the said costs personally.

Dated and delivered at Nairobi this 11th day of December 2007.

**D A ONYANCHA**

**JUDGE**