



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

Civil Suit 34 of 2006 (OS)

TERESIA WANGUI NG'ANG'A.....APPLICANT

VERSUS

HARUN NG'ANG'A WANYOIKE.....RESPONDENT

RULING

Before me is a Chamber Summons dated 2nd June 2006 filed by Gichuki Kingara & Company advocates on behalf of the applicant Teresia Wangui Ng'ang'a. It was brought under Section 3A of the Civil Procedure Act (Cap 21) and Order 39 rule 1, 2 and 3 of the Civil Procedure Rules. The application has grounds on the face of the Chamber Summons, and is supported by the affidavit of the applicant sworn on 2nd June 2006. It seeks for 9 prayers, but prayer 1 has been spent. The respondent filed a replying affidavit sworn by himself on 14/6/2006.

At the hearing of the application on 22/6/2006 Mr. Goi appeared for the applicant while Ms. Chege appeared for the respondent.

Mr. Goi submitted that they were seeking for restraining orders against the respondent in respect of matrimonial property and also orders against the respondent withdrawing money from the bank accounts at Thika. They were seeking for these orders pending the determination of the main cause. He submitted that the applicant and respondent were a husband and wife who acquired properties after the marriage. There was fear by the applicant that the respondent will intermeddle with the properties. The applicant had already filed an Originating Summons under the Married Women's Property Act, on the division of the properties, and she would suffer irreparable loss if the properties were transferred or dealt by the respondent without her interests being taken into account. She sought to rely on the case of **Shah –vs- Shah Civil Application No. NAI 73 of 200 (UR. 31/2000)**. He contended that in that case similar orders of injunction as sought herein were granted by the Court of Appeal. He also sought to rely on the case of **Cosmas K.Muthembwa –vs- Eunice Kyalo Muthembwa**, Nairobi Civil Appeal No. 74 of 2001

Ms. Chege for the respondent opposed the application. She submitted that the applicant had failed to serve the respondent. To date the respondent had not been served. Therefore the application is incompetent.

She further submitted that the court should consider the provisions of Section 17 of the Matrimonial Causes Act (Cap 152) as well as Sections 27 and 28 which provide for separation and consequences of separation. Her contention was that the marriage between the parties was still subsisting. Therefore the court had no business in interfering with their property.

She further submitted that the applicant had not satisfied the requirements for the issue of orders of temporary injunction by the court. Applicant did not show a case with probability of success. Nor did she establish that she would suffer irreparable loss, and that damages would not be adequate compensation. Also the applicant had misrepresented facts, and had therefore come to court with unclean hands. She submitted that the freezing of personal accounts of the respondent would affect his business and his own upkeep and medical attention. She submitted that the respondent was ready to give any undertaking on the assets, except his personal bank accounts before hearing and determination of the suit.

I have considered the application and submissions of both counsel. The applicant and the respondent are husband and wife under customary law. They have not been divorced, nor are they formally separated. However, they appear to have had serious disagreements resulting in the applicant filing an Originating Summons under section 17 of the married Women's Property Act 1882 dated 2nd June 2006, for declarations and orders on division of what she considers to be matrimonial property. She then filed this Chamber Summons which is before me. On 5th June 2006, the court granted restraining orders on the bank account of the respondent at Standard Chartered at Thika Branch.

Having considered this application and the documents filed herein, it is clear to me that some properties were acquired during the marriage between the applicant and the respondent. The said customary marriage is still subsisting. The applicant has her own bank account with Barclays Bank of Kenya Ltd. Thika Branch number 6324258 and the respondent has a separate bank account at Standard Chartered Bank Ltd. Thika Branch number 01020423 13600. The said accounts are not in any way joint accounts.

The first issue that arises from the application is whether the fact that the respondent has not been served means that the application of the applicant is incompetent. On 5/6/2006 the court ordered that the application should be served on the respondent, for the inter-parties hearing. That appears not to have been done. That does not reflect very well on the conduct of the applicant's counsel. However since the respondent somewhat learnt of the matter and came to court, I will leave it at that. I find no reason to declare the application incompetent for lack of service.

The second issue is whether this court has jurisdiction to entertain this matter, and the application, in view of the fact that the parties have not obtained a formal separation from the court. I have been referred by counsel for the respondent to Sections 17, 18 and 19 of the Matrimonial Causes Act (Cap. 152). My perusal of those sections do not indicate that this court cannot grant the orders sought before formal separation. The Sections only deal with judicial separation and its effects on assets acquired during that separation, and liabilities for commitments of the wife for necessities. In any event, the issue of which assets belong to which spouse will be determined in the main Originating Summons herein. I find no legal basis at this preliminary stage, for the contention that this court has no jurisdiction to entertain this matter, simply because the parties have not formally separated as husband and wife.

The cases cited by the applicants counsel that is the case of **Shah –vs- Shah**, Civil Application No. 73 of 2000 (UR 31/2000) and the case of **Cosmas K. Muthembwa –vs- Eunice K. Muthembwa Nairobi Civil Appeal No. 74 of 2001** clearly show that restraining orders can be granted, and that assets acquired during marriage can, on the evidence produced, be found by court to be matrimonial property and therefore subject to division between a separated husband and wife.

The applicant has asked for several interlocutory restraining orders in his application. The considerations to be taken in applications for the granting of temporary injunctions have been well settled. The applicant has to show a prima facie case with probability of success. Secondly the applicant has to show that he will suffer irreparable loss if the orders sought are not granted, that is that an award of damages will not be adequate compensation. Thirdly, if the court is in doubt, it will determine the matter on the balance of convenience (see **Geilla –vs- Cossman Brown [1973] EA. 358**).

Counsel for the respondent has submitted that the respondent is ready to give any undertaking on the properties, except the personal bank account; till the determination of the case. I find that the applicant has a prima facie case with probability of success on issues touching on movable and immovable

property. It could be matrimonial property depending on evidence to be adduced. That would cover prayers 2 (part of it), prayer 4 and 6. I find that if the prayers are not granted the applicant will suffer irreparable loss.

On prayer (2) however, I do not see how the applicant can have a prima facie case in asking for orders that the respondent should not introduce or bring an intended second wife into the premises in Nyacaba Juja town L.R. 10821/21. This court cannot prevent the respondent from having a girl friend or marrying. That is his legal right. The substituting marriage between the applicant and respondent is under customary law and therefore potentially polygamous. The only thing that the applicant can ask or apply for is a divorce, which will be considered on its own merits.

On prayer (3) also I do not see any reasonable case with probability of success. The bank account at Standard Bank of Kenya Ltd. Thika branch is in the name of the respondent. There is no indication that it is a joint account or that the applicant has put any money in that account. The applicant has her own separate account at Barclays Bank Thika Branch, which she is operating without any impediments. I cannot grant prayer (3).

On prayer 5, seeking for that all income from rented premises be collected by a registered agent, no evidence has been placed before this court by the applicant on the current position of rental houses or collection of rent. Her supporting affidavit is completely silent on rented houses/premises. On the facts before me, I cannot grant that prayer. I find no prima facie case on the issue of rented premises with probability of success. I therefore decline to grant the same.

For the above reasons the application succeeds in part. I grant prayers 4 and 6. I grant prayer 2, except the part that the respondent should be prevented from introducing and/or bringing or housing his intended second wife therein or in the precincts of the said matrimonial home and land. I decline to grant prayers 3 and 5. The interim orders granted by court are hereby lifted. Prayer (1) has been spent and prayers 7 and 8 do not add any substance to the application; Costs of the application will be in the cause.

Dated and delivered at Nairobi this 13th day of July 2006.

George Dulu

Ag. Judge