**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 54 of 2006 (OS)**

**IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT, 1882**

**EUNICE ATIENO OTIENO ……...……PETITIONER/RESPONDENT**

**VERSUS**

**RICHARD OTIENO HARUN…….……1ST RESPONDENT/APPLICANT**

**SAMSON ODERA OTENG……..……2ND RESPONDENT**

**RULING**

This Ruling relates to notice of motion dated 25.10.06 filed the same day by the 1st respondent under Order XXXIX rule 4 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, Cap.21 applying for the following orders:-

1. That her application be certified urgent and heard ex-parte in the first instance.

2. That the orders granted by this honourable court on 04.10.06 be discharged and/or set aside.

3. That the costs of this application be provided for.

The grounds upon which the notice of motion is made are:-

i) That the orders granted on 04.10.06 were made without jurisdiction and are illegal.

ii) That the applicant (petitioner) obtained the said orders through non-disclosure and/or concealment of material facts.

iii) That the applicant (petitioner) obtained the said orders by means of a false statement in her affidavit in support of the application dated 03.10.06.

iv) That the suit property is not a matrimonial property within the meaning of the Married Women's

Property Act, 1882.

The notice of motion is supported by the 1st respondent's/applicant's affidavit sworn on 25.10.06.

The notice of motion was filed in opposition to *ex-parte* orders granted to petitioner/respondent on 04.10.06 following her chamber summons dated 03.10.06 and brought *ex-parte* under certificate of urgency on 04.10.06. The orders sought *ex-parte* vide the chamber summons were:-

1. That the 1st respondent be restrained from collecting, receiving and/or spending the income derived from the sale of L.R. No.12703 situated at Karen, Nairobi.

2. That the 1st respondent be restrained from collecting, receiving and/or spending the income derived from the sale of L.R. No.12703 situated at Karen, Nairobi.

3. That this Honourable court be pleased to direct that Kshs. 8.5 million being part of the income (1st respondent's share) derived from the sale of the above which is being sold at a total sum of Kshs.50 million L.R. No.12703 situated at Karen, Nairobi be deposited in court by the respondents, their advocates, bankers and/or agents forthwith pending the hearing and determination of the cause herein.

4. Such other orders as this honourable court may be deemed to grant (sic).

5. That the cost of this application be provided for.

The chamber summons was based on the grounds:-

a) That the applicant (petitioner) is the lawful wife of the 1st respondent.

b) That the half of the property above named was acquired by joint efforts of both the applicant and 1st respondent during their marriage.

c) That the respondents are selling off the above mentioned property and have refused failed to agree to give me my share. If orders sought for are not granted the applicant shall suffer irreparable damage.

d) That all the title documents to the property are in the custody of the respondents.

e) That the applicant's (petitioner's) case has high chances of success.

The chamber summons was supported by the petitioner's affidavit sworn on 03.10.06. Learned counsel, Miss C.K. Obara held Mrs. J.S. Gombe's brief and argued the *ex-parte* application on behalf of the petitioner on 04.10.06. Prayers 1, 2 and 3 were granted *ex-parte* as prayed.

When the notice of motion came up for hearing *ex-parte* before me on 26.10.06, the 1st respondent was represented by learned counsel, Mr. P. Amuga. He submitted in essence that the orders given *ex-parte* were contrary to Orders XXXIX rule 3 (2) of the Civil Procedure Rules in that the injunction granted pursuant to prayers 2 and 3 in the chamber summons dated 03.10.06 did not give expiry time within 14 days; that an *ex-parte* injunction can be granted only once and for a maximum of 14 days; and that since the subject injunction did not specify an expiry period within 14 days, the said injunctive orders were given without jurisdiction and should, therefore, be discharged *ex-parte.* On this latter point he relied on London City Agency (JCD) Ltd & Another -vs- Lee & Others [1969] 3 ALL E.R. 1376. As regards the point that an *ex-parte* injunction given for more than 14 days is invalid, 1st respondent's counsel relied on Kenya Court of Appeal Civil Appeal No.59 of 1993, Omega Enterprises (Kenya) Ltd -vs- Kenya Tourist Development Corporation, Kenya National Capital Corporation Ltd and Andrew David Gregory. Counsel also referred to Ansah -vs- Ansah [1977] 2 All E.R. 638 to make the same point, adding that the 1st respondent would suffer irreparable loss if the *ex-parte* orders are not discharged.

Counsel for 1st respondent criticised petitioner's counsel for not drawing the court's attention to Order XXXIX rule 3 (2) to the effect that the *ex-parte* orders sought and obtained should be for not more than 14 days. In his view this was deliberate and insinuated that the intention was to mislead the court. He said he came to the conclusion that the omission was intentional on the bais that after getting the injunctive orders, petitioner's counsel proceeded to take a hearing date for the chamber summons on 30.11.06 instead of taking a hearing date within 14 days of the issuance of the injunctive orders of 04.10.06. Counsel for 1st respondent reiterated his prayer for the discharge of the *ex-parte* injunctive orders issued on 04.10.06

After hearing 1st respondent's/applicant's counsel's arguments in support of the notice of motion, I announced that I had duly noted the legal provisions and case law cited in support of the notice of motion; that the matter at hand sounded contentious; and that I considered it would enure to the overall benefit of jurisprudence for the petitioner/respondent to be accorded an opportunity to respond to the notice of motion. Accordingly, I directed that the notice of motion should come up for *inter-partes* hearing on 30.10.06 and that the petitioner/respondent be served therewith. On 30.10.06 learned counsel, Mrs J.S. Gombe appeared for the petitioner/respondent while the 1st respondent/applicant continued to be represented by learned counsel, Mr. P. Amuga. Petitioner's counsel said she had not had adequate time to consider the notice of motion and the authorities cited in support thereof. She asked for time until next day and I adjourned the *inter-parties* hearing until 31.10.06.

On 31.10.06 I heard the parties arguments and counter-arguments over the notice of motion. Counsel for 1st respondent/applicant basically reiterated his earlier submissions while counsel for petitioner/respondent said she 'agreed that *ex-parte* orders are normally for 14 days'. However, she submitted that the court has inherent jurisdiction to give an *ex-parte* order as it deems fit and just considering particular circumstances. She denied that omission by her side to draw the court's attention to Order XXXIX rule 3 (2) was deliberate or that it had the intention of misleading the court. She added that the hearing date of 30.11.06 for her chamber summons was the earliest available date the court registry could give and that she had no say over the matter. Petitioner's/respondent's counsel urged this court to invoke its inherent power and use its discretion not to discharge the *ex-parte* injunctive orders of 04.10.06. It was also her contention that it is the petitioner/respondent who would suffer irreparable loss if the *ex-parte* injunctive orders are discharged.

I have given due consideration to the arguments and counter-arguments of the parties.

Ground (a) in the petitioner's/respondent's chamber summons dated 03.10.06 was framed as follows:

'**a) THAT the applicant is <u>the</u> lawful wife of the 1st respondent.**'

As a matter of English, that means and I understood it to mean that the petitioner/respondent was the only wife of the 1st respondent. However, the papers filed by the 1st respondent/applicant have revealed, and the petitioner/respondent has conceded, that she is not the only wife but 2nd wife of the 1st respondent/applicant. The petitioner/respondent deposed in her affidavit in support of her chamber summons that she contributed directly and indirectly towards the purchase of the suit property. The 1st respondent's/applicant's affidavit rejoinder is that the petitioner/respondent made no contribution. It is common ground that the suit property is registered in the names of the respondents only. The petitioner/respondent also deposed that if the orders sought *ex-parte* were not granted, she and her children stood to suffer irreparable loss. The affidavit rejoinder by the 1st respondent/applicant is that one of the reasons he wants to sell the suit property is to use part of the proceeds of sale to pay fees for his daughter, Maureen Achieng Otieno he got with the petitioner/respondent to enable the said Maureen to gain entry into Curtin University of Technology in Perth, Western Australia.

The affidavit response by the 1st respondent/applicant even on the few matters highlighted above indicates clearly that there is controversy between the petitioner/respondent and the 1st respondent/applicant even on matters which are fairly elementary, while the picture painted by the

petitioner/respondent in her *ex-parte* prayers was that the matter was simple and clearly in her favour. That was misleading to the court.

More fundamentally, there is the legal issue arising from Order XXXIX rule 3 (2), which provides:

'**3. (2) An *ex-parte* injunction may be granted only once for not more than fourteen days and shall not be extended thereafter.'**

The *ex-parte* injunctive orders challenged by the notice of motion were sought and granted on 04.10.06. The court record shows that on 09.10.06 a representative of the petitioner's/respondent's counsel appeared at the court registry and took the date of 30.11.06 for (*inter-partes*) hearing of the chamber summons dated 03.10.06. There is no indication on record of any representation made that such hearing would by virtue of Order XXXIX rule 3 (2) be required to take place within 14 days of the issuance of the *ex-parte* injunctive orders of 04.10.06. I note from the interpretation given of Order XXXIX rule 3 (2) by the Omega Enterprises case (supra) that the said rule 3 (2) means that:

'no *ex-parte* injunction in any case shall be for more than 14 days.'

Apart from the fact that that decision is binding on the High Court, it does, with respect, make good sense in the light of the clear wording of Order XXXIX rule 3 (2) to the same effect. It follows that the *ex-parte* injunctive orders made by this court on 04.10.06 without limiting the duration of the said orders to a maximum of 14 days was made *per incuriam*.

Section 2 of the Civil Procedure Act defines 'court' as meaning the High Court or a subordinate court, acting in the exercise of its civil jurisdiction. Order XXXIX rule 4 provides:

'4. Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.'

I am satisfied on the material placed before me that the *ex-parte* orders sought and granted on 04.10.06 are invalid, being contrary to Order XXXIX rule 3 (2); that those orders cannot stand; that I am empowered to discharge the said orders; and that there is no discretion in the matter. Accordingly, the *ex-parte* injunctive orders made by this court on 04.10.06 are hereby discharged. That concludes the matter directly in issue before me and it is so ordered. Costs shall be in the course.

There are, however, certain incidental arguments made in the course of deliberations in the Omega Enterprises case (supra) which cause me some anxiety and I feel, without intending any discourtesy, constrained to make the following *obiter* observations relating thereto. I refer to the observations to the effect that if an act is void, it is in law a nullity and that there is no need for an order of the court to set it aside. I am of the humble view that that is a dangerous stance to take in the context of judicial orders. For a conclusion to be arrived at validly that a judicial order is invalid and, therefore, null and void, such conclusion ought be the result of the due process of law, through an application like the one just adjudicated upon herein. I share the sentiments expressed by Lord Diplock in Issaac -vs- Roberston [1984] 3 All ER 140 at 142, namely:

'**It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged ….[2]A party, who knows of an order, whether null or void, regular or irregular, cannot be permitted to disobey it …. It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."'**

There is clear need in my respectful view to protect the judicial function from infitration by interested

parties as allowing such would make such parties judges in their own cause, contrary to the rule of natural justice. This is undesirable and ought to be avoided.

Orders accordingly.

**Delivered at Nairobi this 6th day of November, 2006.**

B.P. KUBO

JUDGE