



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

Civil Case 9 of 2006

HELLEN WANJUGU KIAGAYU

MATHAI NGATIAPLAINTIFF/RESPONDENT

VERSUS

ROBERT KIBIRI WOKABI

MWANGI MATHAI..... DEFENDANT/RESPONDENT

PETER KANIU NDEGWA (ATTORNEY OF DANIEL KARANJA KANIU)....1ST INTERESTED PARTY/APPLICANT

HARUN NJIHIA NJOROGE..... 2ND INTERESTED PARTY/APPLICANT

RULING

On 31.05.06 the interested parties/applicants filed chamber summons under Order XXXVI rule 12 of the Civil Procedure Act, Cap.21 applying for the following orders:-

1. That the honourable court be pleased to enjoin the interested parties/applicants herein to this action.
2. That this honourable court be pleased to stay further proceedings in this action pending the hearing and determination of the issue (of) title to L.R. No. Ngong/Ngong/23380 and L.R. No. Ngong/Ngong/23381.
3. That in the alternative, this honourable court be pleased to exclude L.R. No. Ngong/Ngong 23380 and L.R. No. Ngong/Ngong/23381 from the list of contested matrimonial property.
4. That this honourable court be pleased to transfer to itself, and consolidate with this action, Kajiado Maintenance Cause No.22 of 2005 for expeditious hearing.
5. That the cost of this application be provided for.

The grounds upon which the application is based are:-

- i) That the interested parties are bonafide purchasers of L.R. No. Ngong/Ngong/23380 and L.R. No. Ngong/Ngong/23381, respectively.

- ii) That the properties stated above have been transferred to the interested parties for valuable consideration.
- iii) That the interested parties herein stand to be adversely affected by any purported division of matrimonial property that includes L.R. No. Ngong/Ngong/23380 and L.R. No. Ngong/Ngong/23381.
- iv) That there exists a maintenance cause being Kajiado Maintenance Cause No.22 of 2005 in which the two premises stated above have purportedly been reverted to the defendant/respondent without participation of the interested parties/applicants herein.
- v) That Kajiado Maintenance Cause No.22 of 2005 has not been heard and determined inter-partes.
- vi) That the issues raised in Kajiado maintenance Cause No.22 of 2005 would most advantageously be heard and determined in this action with the participation of the interested parties/applicants.

The application is supported by the affidavit of Peter Kaniu Ndegwa sworn on 25.05.06.

At the hearing of the application before me on 26.10.06, the interested parties/applicants were represented by learned counsel, Mr M.M. Muriuki. The defendant/respondent appeared in person while there was no appearance for the plaintiff/respondent.

Counsel for interested parties/applicants informed this court that the plaintiff/respondent was served through her lawyers on record, Betty Rashid & Co. Advocates. An affidavit by Benjamin Musembi Musili, process server sworn on 25.10.06 shows that he served the firm of Betty Rashid & Co. Advocates with requisite hearing notice on 08.08.06. There was, therefore, no explanation for non-representation of the plaintiff/respondent at the hearing, so hearing proceeded notwithstanding the plaintiff's/respondent's absence.

Counsel for interested parties/applicant made submissions in support of the application. In essence, he emphasized the need for this court to transfer to itself Kajiado Principal Magistrates Court Maintenance Cause No.22 of 2005. He contended that the plaintiff filed the present suit in Nairobi while knowing she had filed the Kajiado case relating to the same subject matter. It was counsel's submission that the matter in issue in the Kajiado case is substantially in issue in the present case and that the interested parties/applicants are not a party to either suit while they are bonafide purchasers of the premises subject matter of the present suit which happen to be also the suit premises in the Kajiado case. He maintained that the Kajiado court lacks jurisdiction under the Subordinate Courts (Separation and Maintenance) Act, Cap.153 to apportion property in a matrimonial dispute and that even if the Kajiado court gives a maintenance order, it lacks jurisdiction to dish out of the proceeds or properties the maintenance that may be provided. He submitted that the two suit premises cannot validly constitute matrimonial property as they were previously sold to interested parties and titles issued to the said interested parties. It was counsel's view that the two properties should be excluded from the list of contested matrimonial properties. Counsel for interested parties/applicants informed this court that on 15.06.06 the plaintiff was allowed to put in a replying affidavit within 14 days but had not done so, some 4 months down the line. Counsel inferred from the omission that the plaintiff/respondent was not interested in contesting the application and reiterated the prayers in the originating summons.

For his part, the defendant/respondent submitted that the plaintiff, Hellen brought a defective case via her originating summons dated 01.02.06 and withholding crucial facts, e.g. the fact that the two suit properties had already changed hands. The defendant/respondent pointed out that the plaintiff/respondent was at fault in maintaining that the defendant/respondent hold the two suit premises in trust for the family and submitted that he cannot hold the premises in trust as he has no title to them. The defendant/respondent said he relied on his replying affidavit sworn on 06.06.06 and urged this court to dismiss the suit with costs.

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

There appear to be conflicting claims regarding ownership of the properties L.R. No. Ngong/Ngong/23380 and L.R. No. Ngong/Ngong/23381 said to be a subject matter in Kajiado Principal Magistrate's Court Maintenance Cause No.22 of 2005 and the case before me, i.e. High Court Civil Case No.9 of 2006. If the interested parties/applicants herein lay claim to the two properties particularized above, I consider it would be wrong to deny the interested parties/applicants the joinder they seek, which would then give them *locus standi* to articulate their interest in the properties in opposition to their being included among the matrimonial properties the parties to the two court cases lay claim to. The purport of the chamber summons dated 25.05.06 is not to seek the award of substantive rights to the properties in question upon the intended interested parties at this stage. Rather, what the intended interested parties have sought vide their said chamber summons is *locus standi* to enable them to articulate claims they reckon they have to have suit properties. Whether or not those claims will eventually succeed is a different matter. *Ex-facie*, the applicants seem to have arguable claims which deserve to be heard and determined on merit. I am persuaded that the interested parties/applicants have established a case for the grant of the bulk of the prayers sought vide the chamber summons dated 25.05.06. Accordingly, I hereby grant prayers 1, 2 and 4 in the chamber summons dated 25.05.06. Costs shall be in the course.

Orders accordingly.

Delivered at Nairobi this 11th December 2006

B.P. KUBO

JUDGE