



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 174 of 2005

AFWA MOHAMED RAMADHAN APPLICANT

- Versus -

ATHUMAN NUSURA JUMA RESPONDENT

Coram: Before Hon. Justice Mwera

Mrs. Njoroge for Applicant
Chidzipha for Respondent
Court clerk –Kazungu

RULING

The applicant, Afwa, has filed the originating summons herein seeking five declarations that during her marriage to the respondent Athuman, they acquired property No. KILIFI/MTWAPA/3820 by joint funds and efforts. That she also has shares in the second floor flat in the property known as No. 151/XVII/M.I., and that she is also a coowner of motor vehicle reg. No. KAL 315D with the respondent. A further declaration is sought to the effect that the applicant also has a share in another property No. KILIFI/MTWAPA/584, so this court should determine each party's extent of rights and accordingly divide the properties. The Originating Summons does not state which law is applicable or invoked but a chamber summons of the same dated 26/8/2005 brought under Order 30 rules 1, 2, 3, 9 and Section 17 of the Married Women Property Act reveals that.

By that application the applicant has the main prayers:

- 1) That the respondent be restrained from interfering or selling off the plots No. 584, 151, 3820 Kilifi (above) and the motor vehicle also stated above – which properties she should otherwise be left to enjoy until this application and suit are determined.
- 2) That the proceedings in the Kadhi's court case No. 166/2005 should be stayed until this originating summons is determined.

The applicant swore an affidavit and Ms Njoroge told the court that she was once married to the respondent until 26/8/2004 when he “purported” to divorce her. That although he acquired properties No. 151 and 584 before the marriage, she had spent considerable time, energy and money improving them and that on No. 151 particularly she took a loan to erect the second floor. As for the motor vehicle (No. KAL 315D), on the respondent's advice she sold her matatu (KAH 533 W) to clear it and have it registered. That they bought plot No. 3820 and built on it. That the applicant carried out all the foregoing as the

respondent all the time lived abroad. Further that after this “purported” divorce of 26/8/2004, he then filed the said Kadhi Court case and got adverse orders against her.

The annexures to the supporting affidavit showed that the respondent filed a plaint in the Kadhi’s court together with a chamber summons asking to injunct her to vacate his house on plot No. 151 and to return his household goods and motor vehicle registration No. KAL 137D. He sought a further order barring the applicant from selling the said household goods, motor vehicle or house on plot 3820. A temporary injunction of 3/8/2005 issued regarding the disposal of the properties with a direction that parties assemble for inter partes hearing on 29/8/2005. The applicant could not wait for that so she brought this originating summons and the application under review.

The other aspect of the arguments was that certificate of divorce although witnessed, paid for and duly registered was REVOCABLE and in any case the applicant had not signed it. That accordingly the divorce (it was not explained why the applicant termed it “purported”) was not final and accordingly she was within the Married Women Property Act, the Act (above) to bring these proceedings.

Mr. Chidzipha filed and argued five (5) grounds of opposition supplemented by the respondents’ replying affidavit sworn on 6/9/2005, with the annexures. The court heard it repeated that plots Nos. 151 and 584 were acquired by the respondent before their marriage. But that any developments on them were facilitated by the funds he remitted to the applicant while one Swaleh Omar managed everything. The applicant’s contribution was denied even as to building the second floor on plot 151. There was also a denial regarding the motor vehicle KAL 315. The respondent believed that the Act did not apply to marriages contracted under the Islamic Law or that if it did, it must be invoked before the divorce decree is made absolute.

After all the above, this court begins by determining the last prayer – to stop proceedings in the Kadhi’s court. This will not be. The chamber summons does not lay out the provision of law to stay those proceedings or the basis for such orders. That an interim injunction has been issued against the applicant, it not a sufficient reason to stay the proceedings before the learned Kadhi. He gave that order ex parte and even if the day of inter partes hearing on 29/8/2005 passed, the parties still have a chance to ventilate their respective positions before the Kadhi. May they proceed accordingly. In this court’s view, the applicant can use her application here to oppose the respondent’s chamber summons dated 21/7/2005 during the inter partes hearing. The prayers to restrain one party here or the other there from interfering, alienating this or that property is common in both applications. And that the Kadhi is properly seised of the earlier application may he continue to hear the litigants. They should also be heard on whether the applicant should vacate from the respondents’ plots, or return his household goods and motor vehicle. We should not have same issues being canvassed in two different for a at the same time.

In sum the prayers sought here are refused with costs in the cause. It is added that at this juncture this court has not considered to determine whether the divorce between the litigants is absolute or by being termed “revocable”, the parties are still married. Not even the fact that the applicant refused to sign the divorce certificate and the impact of that. Also whether the Act is appreciable in the circumstances of the legal tussles between the parties. That will await the hearing of the originating summons.

In sum the orders sought are refused. Costs in the cause.

Delivered on 22nd September 2005.

J.W. MWERA

JUDGE