

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 30 OF 1999

SELINA ACHIENG ONEGE PLAINTIFF

versus

HANS JURGEN ZAHLTEN DEFENDANT

R U L I N G

In this application for injunction the Applicant (wife) has argued on the presumption that there was a marriage between her and the husband/Defendant over matrimonial union existing between the parties. The claims are for distribution for property acquired during the state of cohabitation between the two. The main issue therefore hinges on that relationship and the existence of marriage is the crucial factor. It is the court's duty to adjudicate issues between parties that conclude the differences between them. It is the legal duty of the courts to channel and synthesize those issues so that conclusive adjudication upon them settles those disputes in law. It is under these principles that law relating to amendment of pleadings is based.

It is because of this that the court has inherent jurisdiction to collate evidence and frame issues arising therefrom.

From the arguments of the parties if there is non pleaded issue which they in fact and in effect have whether mentally or expressly formed up and argued on before the court, the court has a right to adjudicate on such issue. That is the principle in the Court of Appeal in 1967 EA. Having said that Mrs. Nandwa for the "wife" wants an adjournment so that the issue relating to the relationship of the parties be determined on a prayer for a declaration of that relationship. Omission could have been cause by mere negligence or mistaken presumption or by deliberate intention. But Mr. Mabea has opposed the application for adjournment which Mrs. Nandwa wants so as to insert the prayer which is missing.

I think Mr. Mabea is right, and the fact that he raised then in his defence should have given the plaintiff reason to reflect on the pleading. But again this could only have been negligent on the part of draftsman. But under our law as I see it a mistake by advocate should not be visited on the party. Therefore so as to allow Mrs. Nandwa to effect an amendment which amendment, in my view has a direct scope of bringing before this court the very issue which relate to this matter. I think the court is bound as a matter of justice to allow this. I therefore allow this application for adjournment and direct that the application for amendments be filed and served within 7 days and then the Defendant to have opportunity to reply to the same within 7 days thereof, so that this matter can be brought to this court on the 13th July 2000.

Now as for injunction order which is existing this should remain undisturbed until further orders. With regards to costs for this adjourned, I think the Plaintiff should pay costs in the amount of KShs.2,000/- to the Defendant for this adjournment. This is the order of the Court.

Read in open Court on this 22nd Day of June, 2000.

A.I. HAYANGA

JUDGE

