



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL CASE NO. 71 OF 2015 (o.s.)

FKBPLAINTIFF

VERSUS

JBRDEFENDANT

RULING

1. By her application **dated 29/3/2021**, the applicant seeks leave of the court to file and serve a supplementary affidavit to exhibit two documents being; an agreement for sale of land subject of the proceedings and a certificate of decree absolute issued in **Meru Divorce Cause No. 16 of 2017**.
2. The reasons advanced to premise the application are that by inadvertence the agreement of sale was never made an exhibit in the Affidavit in Support of the originating summons and that the divorce cause was concluded while this suit was pending and thus the certificate was not availed at the commencement of the suit.
3. The application was opposed by the respondent on the basis of a Replying Affidavit sworn by that respondent on the 23/4/2021. The gist of the resistances is that no money was paid to him by the plaintiff as a consideration, that he would apply that both parties go before the **Njuri Ncheke** and take an oath on the alleged sale and consideration; and that him and his advocate were not made aware of the judgment in the divorce cause which he intends to challenge. Consequently, it was asserted that the application lacks merit and that the applicant stands to suffer no prejudice if the application is refused because the land is already in her name anyway.
4. I have read the application, the affidavit in opposition thereto and taken into account the arguments by **Mr. Wamwayi Advocate** for the applicant. I appreciate the application to seek leave of the court to file additional documents in an originating summons by way of a Supplementary Affidavit.
5. My reading of both the **Matrimonial Property Act** and the **Provisions of Order 36**, on the originating summons, discloses no restriction on filing of additional documents or indeed evidence at any time of the proceedings.
6. A court of law is not expected to proceed in a way as to encourage itself into walking into a dark alley devoid of directions toward finding the truth in a dispute it is to determine. Legal disputes are best determined by evidence and such evidence need to be availed wholly to the court provided no side is prejudicial by being put in a situation it cannot adequately contest and test the accuracy and authenticity of evidence availed. Situations that may compromise a party's ability to counter the evidence by the adversary is like where one side has concluded production of his evidence then the other seeks to adduce additional evidence not contemplated at the time the adversary adduced evidence and closed its case. However even then, when the justice of the case demands, the court, in pursuit of the truth, may open the window on both sides to give additional evidence.
7. Here the production of evidence is yet to begin. In fact my reading of the file reveals that no directions have been given on how the matter as consolidated shall be hard. I consider this matter to be fairly open such that no interest of justice will be served by obstructing any of the parties from availing the entirety of the materials he/she considers important for the determination of the matter.
8. The converse is that even the respondent should be at liberty to avail any further evidence and documents it may desire to file.
9. I consider the application to be solely intended to avail to court material towards establishing the truth. I do allow it as prayed. Let the affidavit be filed and served within 14 days from today. Upon service let the respondents be at liberty to file any further affidavit he may wish to file.
10. In order that this matter be progressed, I direct that parties do settle the issues for determination within 60 days from today and attend court for case conference on the 29/9/2021.

Costs for application shall be in the cause.

Dated, signed and delivered at Meru this 11th day of June 2021.

In presence of

Mr. Wamwayi for the Petitioner/Applicant

No appearance for Carlpeters for the Defendant/Respondent

Patrick J O Otieno

Judge