



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MATRIMONIAL CAUSE NO.11 OF 2020

IN THE MATTER OF SECTIONS 6 & 17 OF THE MATRIMONIAL 2013

AND

IN THE MATTER OF AN APPLICATION FOR DIVISION OF MATRIMONIAL PROPERTY

BETWEEN

LWM.....APPLICANT

-VERSUS-

HMT.....RESPONDENT

RULING

1. This is a ruling on application dated **16th September 2020**. The applicant seeks opening of a shop closed pending hearing and determination of other prayers in the application prayer 4 of the application.
2. When the matter came up for directions on the application on 1st October 2020, counsel for the applicant informed the Court that she had served the respondent and notice of appointment of Advocate had been filed but no response to the application had been filed.
3. I granted **Mr. Bosire** for the respondent 3 days to file response to the application. On 7th October 2020 when the matter came up for hearing of the application, counsel for the respondent failed to attend Court. The respondent had filed preliminary objection indicating that there was another suit pending before another Court. Counsel for the application informed the Court that they had filed an affidavit to show that there is no pending suit.
4. Counsel for the applicant submitted that the other suit Matrimonial Cause No.9 of 2015 was withdrawn on 31st October 2018 and the supplementary affidavit has exhibited the Court Order; she submitted that being the only issue raised in the preliminary objection, the application is not opposed and that they should have opposed the application through a replying affidavit; that the suit herein is not *res judicata* as it was not decided on merit but was withdrawn and withdrawal does not bar the plaintiff from bringing a fresh suit. She urged the Court to find that the preliminary objection has no basis and proceed to dismiss it and allow prayer 4 and 5 of the application as the application is not opposed. She prayed for police assistance on ground that there has been violence.

ANALYSIS AND DETERMINATION

5. As earlier stated above the respondent filed notice of appointment of advocate and preliminary objection dated 1st October 2020. I have perused the supplementary affidavit. The applicant averred that she instituted Matrimonial Cause No.9 of 2015 but by order of 31st March 2018 she withdrew the suit wholly against the defendant with no orders as to costs. She attached the said Court Order to the supplementary affidavit.
6. She averred that the issues raised in the said suit were not finally determined in the manner contemplated under **section 7 of the civil procedure Act** and this is not therefore *res judicata*.
7. I have perused the Court Order attached to the preliminary objection and do confirm that Matrimonial Cause No 9 of 2015 was withdrawn by order issued on 7th October 2020.

8. I agree with counsel that a party cannot be barred from filing another suit after withdrawn before issues raised are determined on merit. A Suit file can only be *res judicata* if the previous one filed was heard and determined on merit.

9. From the foregoing, I see no merit in the preliminary objection filed and do dismiss it accordingly.

10. In respect to prayers 4 and 5 of the application, no response has been filed by the respondent to challenge issuance of prayers sought by the applicant. The respondent has failed to demonstrate why the plaintiffs Hardware on Plot No.4/312 should not be opened and why mandatory order should not be issued compelling him/respondent to return any goods and/or stock removed from the premises without the applicant's consent.

11. From the foregoing, I am inclined to allow prayer 4 and 5 of the application.

12. FINAL ORDERS

1. Preliminary objection dated 1st October 2020 is hereby dismissed.
2. The respondent is hereby compelled to unlock the doors of the plaintiff's hardware business established on plot no.4/312
3. The respondent is hereby compelled to return any goods and or stock removed from the applicant's hardware business without the consent of the plaintiff/applicant.
4. Area OCS to provide Security to the applicant in the event of resistance.
5. Costs of the application to the applicant.

Ruling dated, signed and delivered via zoom at Nakuru This 5th day of November, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Mrs Mukira Counsel for Applicant

No appearance for the Respondent