



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC NO. 18 OF 2016 (FORMERLY HCC NO. 280 OF 2010)**

**ETHICS AND ANTI-CORRUPTION COMMISSION.....PLAINTIFF/DECREE HOLDER**

**VERSUS**

**DR. DKK.....DEFENDANT/JUDGMENT DEBTOR**

**DM.....2<sup>ND</sup> DEFENDANT**

**NK.....OBJECTOR**

**RULING**

1. This matter has a rather long history, but what concerns the court presently is the objection to execution against certain properties by NK, the wife of the defendant/judgment debtor, Dr. DKK. The objection is brought on the basis that the objector is the spouse of the judgment debtor and has a claim over the subject property under the Matrimonial Property Act and can therefore stop the sale or disposition of such property pending determination of her claim. This question falls within the wider question of whether the spouse of a judgment debtor can maintain an objection on the basis that the property the subject of execution is matrimonial property.

**The application**

2. The application before the court is dated 16<sup>th</sup> May 2019. The applicant seeks an order, first, that the court issues a temporary order of stay of execution of the partial decree dated 16<sup>th</sup> January 2016 and all consequential proceedings. She further seeks preservation orders against the sale, transfer, charging or in any way dealing with title numbers Kericho Municipality Block x/x, Kericho Municipality Blockx/x, Kericho Municipality Block x/x, Kericho/Kapsuser/xxx, Kericho/Kipchimchimxxx and Kericho/ Kipchimchim/xxx pending the hearing of the objection proceedings. She further seeks an order restraining the plaintiffs, their servants or agents from disposing, auctioning, registering instruments sub-dividing or in any dealing with the above properties pending the hearing of HCCC No. 10 of 2015 (OS).

3. The applicant further seeks an order that the partial decree dated 16<sup>th</sup> January 2016 for the sale of Nakuru/Piave/xxx entered against the defendant on 16<sup>th</sup> December 2016 be set aside, reviewed varied or vacated pending the hearing of the present application. As an alternative, the applicant prays to be joined in the proceedings as a defendant.

4. The objector bases her application on the grounds, first, that the decree holder has advertised the properties set out above for sale by public auction. The sale was set to take place on 10<sup>th</sup> and 29<sup>th</sup> April 2019. She contends that she is the wife of the judgment debtor and has a spousal interest in the properties. She also has a pending Originating summons in **HCCC No. 10 of 2015** which is dated 5<sup>th</sup> March 2015, and if the sale is not stopped, she and her children shall be rendered destitute and she shall suffer irreparable loss.

5. The objector had also filed an application for contempt of court against the plaintiff/decree holder on the basis that the plaintiff had frustrated the objection proceedings by proceeding with the sale despite the Notice of Objection dated 8<sup>th</sup> April 2019. The application was, however, withdrawn when the applications came up before the court on 29<sup>th</sup> July 2019. On its part, the plaintiff filed a notice of preliminary objection dated 16<sup>th</sup> April 2019 in which it contends that the present application is *res judicata*.

6. The objection application was presented by the objector's Learned Counsel, Mr. Mengich, while the plaintiff/decree holder (hereafter plaintiff) was represented by Ms. Lai. The 2<sup>nd</sup> defendant has apparently not participated in the proceedings.

7. In his submissions, Mr. Mengich relied on the applicant's affidavit sworn on 16<sup>th</sup> May 2019 and 3<sup>rd</sup> July 2019, as well as submissions dated 12<sup>th</sup> July 2019. Mr. Mengich submitted that the objector, who is the defendant's spouse, has a valid claim to the property in contention. She was not a party to the proceedings before the court which resulted in the consent between the plaintiff and the defendant, and had only

come to learn of the intended sale of the properties when the properties were advertised. Mr. Mengich urged the court to consider the applicant's affidavits in which she sets out in detail how she contributed to the acquisition of the properties.

8. He submitted further that the objector's claim to the properties as matrimonial property was pending before the Family Division of the High Court in HCCC No. 10 of 2015 (OS) for division of matrimonial property. It was her case that some of the property listed for auction fall within the definition of matrimonial property as set out in section 2 of the Matrimonial Property Act. She had acquired a spousal interest in the listed property and requires the protection of the court for her matrimonial rights to be ascertained before the property is sold, otherwise there will be no need to prosecute the matrimonial property case.

9. The objector cites in her written submissions the law and judicial precedents with respect to entitlement of spouses to property acquired during the subsistence of marriage, among them **ZWN v PNN (2012) eKLR** and **Kivuitu v Kivuitu (1991) 2 KAR 241**. She also cites section 93(1) of the Land Registration Act with regard to the recognition of a spouse as co-owner of matrimonial property.

10. With regard to the preliminary objection filed by the plaintiff, Mr. Mengich submitted that it was not based on pure points of law and would require the plaintiff to adduce evidence. He observed that in the preliminary objection at prayer 1, the plaintiff had made reference to objection proceedings in **HCCC No. 316 of 2010**. His submission was that the judgment of Seron, J in that case only directed the objector to proceed to the Family Division to ascertain her rights. In his view, it would be wrong to bring the argument of *res judicata* to the present proceedings as that case was not determined on merit but the objector was directed to the Family Division to ascertain her claim. The objection before the court arose out of a consent between the plaintiff and the defendant, while the matter before Seron J was an objection on a claim of Kshs 18m. Accordingly, the objection to the objector's claim on the basis of *res judicata* must fail.

11. Learned Counsel distinguished the case of **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure and 3 others (2015) eKLR** relied on by the plaintiff on the basis that the present application is an exception to the application of the doctrine as the case before Seron related to 7 properties while the consent related to one property. It was his contention that the objector suspected collusion in the manner the properties were listed. He further sought to distinguish the decision on the basis that a certificate of sale had been done in that case, which had not been done in the present case. Counsel urged the court to dismiss the preliminary objection and allow the objection proceedings.

#### **The response**

12. The plaintiff opposed the application on the basis of a replying affidavit sworn by Abdulhamid Farooque Low on 1<sup>st</sup> July 2019. The plaintiff also filed written submissions dated 26<sup>th</sup> July 2019. Its case was presented by Learned Counsel, Ms. Lai.

13. Ms. Lai first submitted on the background to the present application. This was that the plaintiff/decree holder had carried out investigations against the judgment debtor regarding fraudulent acquisition of funds at [Particulars Withheld] Institute (xxxx) when he was the Director General. It had filed two suits to recover Kshs 556,296.793 from the judgment debtor. In the present suit, ACEC No. 18 of 2016 (which was previously HCCC No. 280 of 2010), a consent was entered into between the parties on 18<sup>th</sup> January 2016. It was a partial consent for Kshs 192 million (the record indicates Kshs 200m). The other amount that the plaintiff was claiming from the judgment debtor was still contested and the suit is still pending.

14. She further submitted that in **HCCC No 316 of 2010-KACC vs Davy Kiprotich Koech**, judgment was entered against the 1<sup>st</sup> defendant for Kshs 18 million. When the consent was entered, an order of prohibition was entered against 6 parcels of land, all registered in the name of the 1<sup>st</sup> defendant. The sale of these parcels of land had already taken place, and only two parcels, for which the plaintiff had filed an application for fresh bids, had not been sold. She further submitted that the objector's matrimonial home was not one of the parcels of land that had been sold.

15. According to Ms. Lai, the single issue between the judgment debtor and the objector had been canvassed and determined in **HCCC No. 316 of 2010 – KACC vs Davy Kiprotich Koech**. The objector in this case had filed objection proceedings on the basis that the property was matrimonial property. The court had considered the issue whether matrimonial property can be attached in execution of a decree without the consent of the other spouse.

16. It had also considered a second issue, whether the applicant can raise an objection to execution of a decree in favour of a third party against her husband on the basis of a special interest. Ms. Lai's submission was that in his judgment dated 18<sup>th</sup> December 2012, Seron J had dismissed the application, holding that a spouse cannot challenge the execution of a decree by a third party on the basis of a claim of a spousal interest. It was Ms. Lai's submission further that no spousal consent is required to execute such a decree.

17. As regards the objector's claim that Seron J had not determined the issue but had directed her to file a claim for division of matrimonial property, Ms. Lai submitted that the point was not an issue before the court, and the statement of the court was *obiter dictum*. Ms. Lai informed the court that the 1<sup>st</sup> defendant, Dr. Davy Koech, had settled the entire decretal amounts in HCCC No. 316 of 2016.

18. It was further submitted on behalf of the plaintiff that following the consent in this suit, the present objector had filed HCCC No. 10 of 2015 (OS) in the Family Division. While claiming a spousal interest, she had filed an urgent application which was heard by Muigai J., and the court had declined to give any temporary orders. No appeal had been filed against the decision, and it was Ms. Lai's submission that this is a classic case of *res judicata*.

19. Ms. Lai relied on section 7 of the Civil Procedure Act and the explanation thereto, as well as the decision in **Housing Finance Company of Kenya vs J.N. Wafubwa (2014) eKLR** to submit that the doctrine of *res judicata* applies to all points which properly belong to the subject of litigation. The matter raised in the present objection proceedings had already been determined by Seron J, who had relied on the decision in **Kipsigis Farm Enterprises v Stephen Ngerechi & 2 others (2014) eKLR** which dealt with a matrimonial home, unlike

the present case.

20. Ms. Lai further submitted that the present objector, with the 1<sup>st</sup> defendant and his second wife, had filed nine different applications in this suit as well as petitions in the Constitutional Division of the High Court on the same issue, trying to fight the sale of the property and trying to deny the plaintiff its right under a consent. She urged the court to dismiss the objection proceedings.

### **Submissions in Reply**

21. Mr. Mengich argued in reply that the objector had nothing to do with the long list of cases cited by Ms. Lai. That no fraud has been proved in the manner in which these properties were acquired; and that the partial consent was recorded in 2016 by which time HCCC No. 10 of 2015 (OS) had been filed.

22. With regard to the matter before Muigai J, his submission was that interim orders were issued for preservation of one property so long as the defendant settled the amount the subject of the consent. He further argued that Sergon J had not delivered a judgment but a ruling and had not determined whether the properties in contention formed matrimonial property.

23. Counsel denied that the objector was engaging in an abuse of process, maintaining that Order 22 has an elaborate procedure for objection to execution. It was his case that this court has the discretion to preserve part of the property not yet sold.

### **Analysis and Determination**

24. The plaintiff concedes that the objector is one of the wives of the 1<sup>st</sup> defendant. From the material before me, she was married in 1975, long before the 1<sup>st</sup> defendant became the Director of xxxx. It is thus conceded that the property in contention was acquired during the subsistence of the marriage.

25. It is also not in dispute that the amounts alleged to have been fraudulently acquired or otherwise misappropriated from xxxx by the 1<sup>st</sup> defendant was so misappropriated when the objector was married to the 1<sup>st</sup> defendant. On this basis, the objector claims a spousal interest in the property in contention.

26. The objector does not, however, deny that there was a consent entered into between the plaintiff and the 1<sup>st</sup> defendant. The consent was entered into on 18<sup>th</sup> January 2016. The consent, according to averments and correspondence contained in the affidavit of Mr. Low, was to the effect that the 1<sup>st</sup> defendant conceded to having embezzled a sum of Kshs 200 million from the xxxx Retirement Benefits Scheme when he was the Managing Director of xxxx and he had agreed to repay this amount.

27. The objector had raised an objection to the attachment and sale of the same properties in **HCCC No. 310 of 2010**. I note that essentially the same orders sought in the present application were sought in the application dated 31<sup>st</sup> March 2014. Similar grounds were raised in support of that application.

28. Sergon J had considered the matter and had cited the decision of Emukule J in **Kipsigis Farm Enterprises v. Stephen Ngerechi & 2 Others (supra)** in which the court had stated as follows:

*“9.02. The Constitution recognises the family as the natural and fundamental unit of the society and the necessary basis of social order, and that the same shall be accorded recognition and protection of the state. It further provides that both spouses shall have equal rights at the time of, during and at the dissolution of the marriage. This is in recognition of the fact that a spouse may have acquired an interest over matrimonial property even though she is not the registered owner thereof and her interest ought to be secured. Indeed Section 79 of the Land Act provides that where a charge is taken upon a matrimonial home, the consent of both spouses must be obtained for the transaction to be deemed valid.*

*9.03. Section 79 cited above, is intended to protect a spouse from dealings by the other involving the matrimonial home without her knowledge or consent. In the instant case, it was not disputed that the applicant was the registered owner of the suit premises and there was no other interest that had been registered against the title. In attaching this land they were acting in pursuance of a court decree, and with the leave of the court and therefore did not require the consent of the applicant as the owner of the land. In my view, if the applicant’s spouse had any overriding interest over the suit land which ought to have been recognised she should have presented her case to enable the court make a determination on her rights. The court cannot presume their existence and make an adjudication on the applicant’s spouse where she is not a party to this suit.*

*9.04. Consequently, I find and hold that there is no law that bars a decree-holder from attaching a matrimonial home in execution of a decree and further he need not obtain the consent of a spouse where such interest has not been registered or declared by the court.”*

29. Sergon J had concluded his ruling on the objector’s application as follows:

*“10. Consequently, I dismiss this application. The objector should address the issue of her right to the matrimonial property before the right forum.”*

30. According to the plaintiff, following the decision of the court in HCCC No. 310 of 2010, the 1<sup>st</sup> defendant settled the entire decretal amount of Kshs 28 million.

31. The core issue that arises before me is whether the present objection proceedings have any merit. In determining this issue, I need to consider whether the proceedings are *res judicata* as argued by the plaintiff.
32. According to the plaintiff, two issues were directly and substantially at issue in the matter before Serگون J. The first was whether matrimonial property can be attached in execution of a decree against one spouse without the consent of the other spouse. The second was whether the applicant can raise an objection to the execution of a decree in favour of a third party against her husband on the basis of a spousal interest.
33. In my view, the plaintiff is correct in its submissions that the issues in the present matter were considered in the ruling of Serگون J set out above. The applicant had objected to execution against the same properties that she objects to in the present application. She cannot properly raise the same issues again and again.
34. The present suit was formerly HCCC No. 280 of 2010. A partial judgment was entered against the 1<sup>st</sup> defendant in the sum of Kshs 200 million. The 1<sup>st</sup> defendant did not honour the partial consent, and the plaintiff sought to execute. I note from the documents annexed to the affidavit of Abdulhamid Farooque Low that the 1<sup>st</sup> defendant filed several matters, including constitutional petitions, an application before the Court of Appeal and an appeal, all in a bid to stop the execution in this matter pursuant to the consent that he had entered into.
35. On her part, the objector in this case filed **HCCC No. 10 of 2015 (OS)** in which she sought injunctive orders before Muigai J in the Family Division. She was seeking to stop the execution of the decree against the same properties as in the present matter. The basis of the application was that the property in contention was matrimonial property. Her application was partially heard and the court, after observing that the matrimonial home was not among the properties included in the decree, declined to issue any interim orders.
36. Section 7 of the Civil Procedure Code provides as follows:

#### **7. Res judicata**

*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.*

*Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.*

*Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.*

*Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.*

*Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.*

*Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.*

*Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.*

37. In **Henderson v Henderson** it was held that:

*“...where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time....”*

38. In its decision in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure and 3 others(2015)eKLR** relied on by the plaintiff, the Court of Appeal observed that:

*“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential*

*ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court.*

39. While the Court of Appeal was, in the above matter, concerned with the application of the doctrine of *res judicata* in a constitutional petition, the principles enunciated in its decision apply with equal force in a matter such as is currently before me: litigation must come to an end; it is not a useful way to spend limited judicial time and resources litigating over the same matters that have been addressed and determined by courts of competent jurisdiction.

40. Having considered the objection application and the submissions and authorities relied on, I am constrained to agree with the plaintiff/decree holder in two respects. First, that the present application is *res judicata*. The same issues having been canvassed before Seron J in HCCC No. 310 of 2010 and raised again before Muigai J in HCCC No. 10 of 2015 (OS), they cannot form the basis of yet another application or suit.

41. The second point on which I agree with the plaintiff is that the present application is an abuse of the court process. In **Muchanga Investments Limited v Safaris Unlimited (Africa) Limited & 2 others (2009)eKLR**, the court cited the decision in **Beinosi v Wiley 1973 SA 721 [SCA]** in which the court set out the applicable legal principle with respect to abuse of process as follows:

*“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse of process.” It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”*

42. For the objector to raise the same issues in the present objection proceedings as have been raised in at least two other matters in which she has been a party, and to hold herself out as not having been aware of the intended attachment is really to abuse the process of the court. It is also to engage the court and the plaintiff in an unnecessary exercise which her Counsel who, from the record, has been representing her in all the previous matters and is presumed to know the law, was aware had a foregone outcome.

43. The upshot of my findings above is that the preliminary objection by the plaintiff to the objection proceedings in this matter is hereby upheld. The objection proceedings dated 16<sup>th</sup> May 2019 are without merit, are an abuse of the court process, and are hereby dismissed with costs to the plaintiff.

**Dated and Signed at Nairobi this 7<sup>th</sup> day of October 2019**

**MUMBI NGUGI**

**JUDGE**

**Dated Delivered and Signed at Nairobi this 9<sup>th</sup> day of October 2019**

**J. N. ONYIEGO**

**JUDGE**