



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISC CIVIL APPLICATION NO. 105 OF 2018

S M W.....APPLICANT

VERSUS

J W N.....RESPONDENT

RULING

1. By these proceedings the applicant herein seeks an order staying the execution of the decree and further proceedings in Machakos CMCC No. 70 of 2014 pending the hearing and determination of Machakos CMDivC No. 3 of 2018.
2. According to the Applicant she is the Defendant in Machakos CMCC No. 70 of 2014 which was filed by the Respondent herein seeking inter alia an order removing the cautions placed on the Land Parcel Nos. Muvuti/Kaani/[Particulars Withheld] and Machakos Municipality Block II/[Particulars Withheld].
3. After the hearing of the said suit, the Court (**Kisiangani, RM**) by the judgment delivered on 19th November, 2014 directed the Applicant herein to remove the said cautions within 28 days from the date of the said judgement.
4. According to the Applicant she filed before the same Court Divorce Petition No. 3 of 2018 against the Respondent herein on 16th February, 2018 in which she seeks inter alia orders that the marriage between her and the Respondent be annulled and or dissolved; that Land Parcel Nos. Muputi/Kaani/[Particulars Withheld] and Muputi/Kaani/[Particulars Withheld] which according to her Petition were allocated to her by the Respondent herein be transferred to her in trust for her children of the union; that the matrimonial home constructed in Muputi/Kaani/[Particulars Withheld] and Muputi/Kaani/[Particulars Withheld] be transferred to her by the Respondent; that the Respondent transfers half of Machakos Municipality Block II/[Particulars Withheld] to her as her share of the matrimonial property; and reasonable maintenance for the children.
5. According to the Applicant the orders for the removal of the cautions will be prejudicial to her Divorce Case since the Respondent is likely to dispose of the properties an action which will render nugatory the said Divorce proceedings.
6. It was submitted on behalf of the Applicant that this Court has the powers pursuant to sections 1A, 1B and 3A of the *Civil Procedure Act* to grant the orders sought. It was further submitted that pursuant to Article 165(3) of the Constitution this Court has unlimited original jurisdiction in both criminal and civil matters. To the Applicant pursuant to Order 46 (sic) rule 6(6) of the *Civil Procedure Rules*, the Court has the inherent jurisdiction to grant an order for stay of execution. Further Order 22 Rules 51 and 52 of the *Civil Procedure Rules* gives the power to stay attachment of a decree pending the determination of the applicant's interest in another matter.
7. To the applicant an order for stay of proceedings should be granted where the court holds the opinion and is clear in the circumstances that prejudice will be occasioned to the applicant if the proceedings sought to be stayed are continues. In this case it was submitted that the trial court in the divorce matter risks having its order as to the division of the matrimonial properties being made in vain.
8. In opposing the application the Respondent filed the following grounds of opposition:

- 1) **The Respondent opposed the application filed herein dated 14-3-2018 and list forth the following grounds of opposition.**
- 2) **That this honourable court lacks jurisdiction to hear and/or determined this application.**
- 3) **That the application is incompetent, frivolous, fatally defective and an abuse of the court process.**

4) That the application offends the provisions of Section 1A and 1B of the Civil Procedure Act.

5) That the application is an appeal in disguise as there is no appeal preferred by the applicant against the decision in Machakos CMC No. 70 of 2014.

6) that the application is brought under the wrong provisions of the law.

9. It was submitted on behalf of the Respondent that this Court has no jurisdiction over the matter. While appreciating that by dint of section 3A of the **Civil Procedure Act** and Article 165 (3) of the Constitution, the High Court has unlimited original jurisdiction in both Criminal and Civil matters, it was submitted that the applicant's apprehension of the law on this point appears rather simplistic since there no suit nor an appeal before this Court. Again the Courts have held time and again that the article 165(3)(a) does not clothe the High Court with jurisdiction to hear anything and that where the law has clothed a court with jurisdiction to hear a certain matter the High Court will not hear the matter; It has no jurisdiction, jurisdiction being vested in another court or tribunal. In this respect the Respondents relied on High Court ELC case No. 287 of 2014 - **Alice Mweru Ngai vs. Kenya Power.**

10. It was therefore submitted that there being neither a suit nor and appeal before this Court, the dispute is in another properly statutorily established forum.

11. It was further submitted that since the matters raised herein speak to a dispute over certain parcels of land, this Court not being an Environment and Land Court does not have jurisdiction to determine the dispute as an appeal would not lie to this Court.

12. To the Respondent, Order 22 Rules 51 & 52 which the applicant relied upon relate to "**objection to attachment**" wherein a party who was not a party to the suit objects to the attachment stating that the attached goods belong to him but not to the judgement debtor. As the applicant in the present suit is a party to determined proceedings to which she has not preferred an appeal, this provision is not available to the present applicant. Similarly Order 46 Rule 6(6) is totally applies were the High Court is exercising its appellate jurisdiction which is not the case here.

13. It was the Respondent's position that since the applicant has filed pending CMC DIV No. 3 of 2018 and her fear are that pending the hearing and determination of the case the respondent may dispose of the alleged matrimonial properties, nothing would have been easier than to file an application for preservation of the property in the Court seized of the matter. As she has not done so this amounts to an abuse of the process of the Court and reliance was placed on **Muchanga Investment Ltd vs. Safaris Un-Limited (Africa) Ltd & 2 Others 2009.**

14. As regards the prayer for stay of proceedings, it was submitted that no material has been placed before the Court to stay the proceedings in CMCC No. 70 of 2014 as there are no proceedings pending in the cause the same having been concluded. Indeed by the applicant's own submissions she concedes the respondent's defence pleading in the said suit that the issues raised therein were determined in the concluded case. The applicant now seeks to muddle up the issues further by coming to this Court.

15. It was submitted that in civil law the only way the High Court can interfere with proceedings pending in a lower Court is through an appeal or through Judicial Review proceedings but again there is no attempts to attack the conduct of the proceedings in the lower Court.

Determination

16. I have considered the application, the affidavits both in support of and in opposition to the application herein. In this case the applicant seeks a stay of execution of decrees in other suits pending the determination of another suit. The application is however predicated upon section 1A and 1B of the **Civil Procedure Act**, Order 22 Rules 51 and 52 of the **Civil Procedure Rules**, Article 165(3) of the Constitution and Order 46 (sic) rule 6(6) of the **Civil Procedure Rules**.

17. Sections 1A and 1B of the **Civil Procedure Act** provide for the overriding objective of the **Civil Procedure Act** and states as follows:

1A(1) The overriding objective of this Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act".

(2) The Court shall, in exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B For the purpose of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims-

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

18. To my mind the overriding objective does not create a cause of action. As was held by Lord Woolf in Swain vs. Hillman [2001] 1 All ER 91 at pp 94 and 95:

"It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible...Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

19. Therefore where there is no cause of action or no real prospect of success in a suit, the overriding objective cannot be invoked to sustain proceedings. Similarly, it cannot be invoked to terminate an otherwise valid claim. In this case nowhere in sections 1A and 1B of the *Civil Procedure Act*, is there a power to stay execution in matter that has been heard and determined pending the determination of a new or any other suit.

20. As regards Order 22 rules 51 and 52 of the *Civil Procedure Rules*, it is clear that the said provisions deal with objection proceedings and the stay contemplated therein is a stay pending the determination of objection proceedings. Accordingly, those provisions are irrelevant in as far as the instant application is concerned.

21. Similarly Order 46 Rule 6(6) is totally irrelevant to this application. From the submissions however it seems that the applicant was referring to Order 42 rule 6(6) of the Rules which provides that:

Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

22. As is clear from the above provision, the same only refers to the power of the High Court to grant temporary injunction in case of an appeal. It cannot therefore be enlarged to empower the Court to grant stay in the circumstances of this case.

23. As regards Article 165(3) of the Constitution, in Karuri & Others vs. Dawa Pharmaceuticals Company Limited and Others [2007] 2 EA 235:

"Nothing can take the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application. Baptising such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process...A Constitutional Court must guard its jurisdiction among other things to ensure that it sticks to its constitutional mandate and that it is not abused or trivialised. There is no absolute right for it to hear everything and it must at the outset reject anything that undermines or trivialises or abuses its jurisdiction or plainly lacks a cause of action... The notion that wherever there is a failure by an organ of the Government or a public authority or public office to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals is fallacious. The Right to apply to the High Court under the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial control of administrative action. In an originating application to the High Court, the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms."

24. To my mind the matter before the Court is purely a civil matter which does not call for the invocation of the provisions of the Constitution.

25. In my view the closest provision is rule 25 of Order 22 of the *Civil Procedure Rules* which provides as follows:

Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided

26. What this provision means is that A files a suit against B and obtains a judgement therein. However B files a separate suit against A. B is in those circumstances entitled to seek that pending the hearing and determination of the subsequent suit, the execution in the earlier suit be stayed. To my mind an application for stay of the decree in the former suit ought to be made in the latter suit and not in a third cause. This is to avoid a multiplicity of suits since as was held by Warsame, J (as he then was) in Standard Chartered Bank Ltd vs. Jenipher Atieno Odok Kisumu HCCC No. 120 of 2003:

“ It is not within the rights of parties to engage in a multiplicity of suits as the multiplicity of suits is meant to obstruct the due process of law and when a party shows design to abuse the powers of the Court, such actions must be stopped to avoid unnecessary costs and waste of judicial time. If a party has a legitimate cause of action he/she must present it before the Court with jurisdiction and resolve the same in that court.”

27. It is therefore my view and I find that these proceedings are incompetent. They are therefore struck out but considering the fact that the applicant claims that she was in some relationship with the Respondent, there will be no order as to costs.

28. It is so ordered.

Read, signed and delivered in open Court at Machakos this 12th day of November, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Nzilani for Mr Makundi for the Respondent

CA Geoffrey