



**IN THE HIGH COURT OF KENYA AT MURANG'A**

**HIGH COURT CIVIL CASE NO 38 OF 2015 (OS)**

**(FORMERLY KERUGOYA ELC CC NO. 55 OF 2015 (O.S))**

**J M N.....PLAINTIFF**

**VERSUS**

**P M K.....DEFENDANT**

**R U L I N G**

1. The originating summons herein dated 08/02/2015 is a claim by a divorced wife for matrimonial property under the *Matrimonial Property Act, 2013* against her erstwhile husband. Together with the originating summons the Plaintiff filed **notice of motion dated 09/02/2015** seeking temporary injunction to preserve the claimed matrimonial properties pending disposal of the suit. That application is one of the two applications the subject of this ruling.

2. The other application is **notice of motion dated 24/02/2016** by which the Defendant seeks an order to stay the present suit pending payment by the Plaintiff of costs awarded against her in a previous suit against the Defendant for the same reliefs upon the same facts that she withdrew. That previous suit is *Nairobi HCCC No 33 of 2012 (O.S)*.

3. The notice of motion dated 09/02/2015 is supported by the Plaintiff's affidavit annexed thereto. That application is opposed by the Defendant by a replying affidavit filed on 24/02/2016. In response to that replying affidavit, the Plaintiff filed a further (should have been supplementary) affidavit on 14/09/2016. In his turn the Defendant filed a further (replying) affidavit on 18/10/2016. On 09/11/2016 the Plaintiff filed a response (should have been a further supplementary affidavit) to the further affidavit. Not to be outdone the Defendant filed a further supplementary affidavit (should have been second further replying affidavit) on 16/11/2016.

4. As for the notice of motion dated 24/02/2016, the Plaintiff filed a replying affidavit on 14/09/2016.

5. I have read the many affidavits for and against the two applications. I have also read and considered the written submissions filed on behalf of the parties. The Plaintiff's submissions were filed on 21/11/2016 while those for the Defendant were filed on 25/11/2016.

**Notice of Motion dated 24/02/2016**

6. I will first deal with the application for stay of suit. The submissions filed on behalf of the Plaintiff did not deal with the two applications at hand at all! Her submissions dealt with the main suit, the originating summons!! I cannot understand why learned counsels for the Plaintiff were under the mistaken notion that the matter at hand was the substantive originating summons.

7. Be that as it may, it is common ground that indeed the Plaintiff had previously sued the Defendant in a

previous suit upon the same facts and for the same reliefs. This was by Nairobi HCCC No. 33 of 2012 (O.S.). She withdrew the suit before it was heard. It is also common ground that costs of that suit were awarded to the Defendant, and that the same were subsequently taxed. Finally, it is common ground that the said costs have not been paid.

8. The court has an unfettered discretion under **Order 25, Rule 4** of the *Civil Procedure Rules, 2010*. The court may order a stay of any subsequent suit brought upon the same, or substantially the same, cause of action in a previous suit before payment of the costs of the discontinued suit; but exercise of such discretion must accord with the dictates of justice, and will depend upon the particular circumstances of the case.

9. A perusal of the many affidavits placed before the court by the parties discloses the seriousness of this suit. It is not in dispute that the parties are a divorced couple. There are a number of properties involved, some of them apparently quite valuable. It is also apparent from the tone of the affidavits that the parties are prepared to fight this suit to the bitter end!

10. As for costs of the previous suit, there is no allegation by the Defendant that he has been unable to recover the same by means of normal execution of decree. This is something the Plaintiff has alluded to in the affidavit she swore in response to the application for stay of suit. But on the other hand the Plaintiff has not explained why she has not paid the costs in the previous suit. She must understand that she is under obligation to pay those costs.

11. I will in the interests of justice give the Plaintiff thirty (30) days from delivery of this ruling within which to pay the costs awarded against her and taxed in Nairobi HCCC No 33 of 2012 (O.S.). In default her present suit (Murang'a HCCC No. 38 of 2015 (O.S.)) shall stand stayed until full payment of those costs.

#### **Notice of Motion dated 09/02/2015**

12. The importance of this suit to the parties has already been alluded to elsewhere above. In her many affidavits now before the court the Plaintiff has demonstrated that she has an arguable case. The Defendant has equally and as forcefully demonstrated that he shall at the hearing require from the Plaintiff strict proof of her claimed contribution towards acquisition of the matrimonial properties. His stand is that he acquired all the properties long before he married the Plaintiff.

13. What cannot be gainsaid is the need to preserve these properties pending the big battle between the parties at the hearing of the suit. The Defendant cannot expect the Plaintiff to be content with his word that he has no intention of disposing any of the properties pleaded in the originating summons. It is also plain that any order herein directing the preservation of the matrimonial properties will in no way impede any existing injunction in the divorce judgment restraining the Plaintiff from interfering with the Defendant in his enjoyment of the matrimonial home.

14. I will in the event allow the notice of motion dated 09/02/2015 by issuing a **temporary injunction restraining the Defendant from disposing of, alienating, wantonly wasting or otherwise damaging the six (6) properties set out in the originating summons dated 09/02/2015 pending disposal of this suit**. This temporary injunction is subject to the condition that the Plaintiff pays the costs awarded and taxed against her in Nairobi HCCC No 33 of 2012 (O.S.) within thirty (30) days of delivery of this ruling. It is so ordered.

15. Cost of these two applications shall be in the main cause.

**DATED AND SIGNED AT MURANG'A THIS 30<sup>TH</sup> DAY OF MARCH 2017**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT MURANG'A THIS 31<sup>ST</sup> DAY OF MARCH 2017**