



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 33 OF 2009 (OS)

TERESIA WACEKE MUNYAKA.....PLAINTIFF/APPLICANT

VERSUS

STANLEY MUNYAKA KAMAU.....DEFENDANT/ RESPONDENT

RULING

1. The applicant in her Notice of Motion dated 2nd March 2016 seeks orders;

- i. That the orders of 26/9/2013 dismissing the suit filed on 2/10/2009 be set aside.
- ii. Cost of application be in the cause
- iii. That this Honorable Court be pleased to grant further orders and or directions as it deems fit.

2. The plaintiff applicant claims that she failed to prosecute the suit for reasons beyond her control. She alleges that her life was in danger and she had sought asylum in the United States of America. During the said period, she was unable to monitor the progress of the matter she was unemployed and was also financially constrained. Adding that her asylum status was so strict that the US Department of Homeland Security could not allow her to travel back and attend her case personally. She avers that she has a legitimate claim, which is meritorious on account of her claim on matrimonial properties, which she contributed towards their acquisition. Should the court deny her an opportunity to pursue her claim she will be condemned unheard contrary to Article 50 of the Constitution. That the defendant is in actual control of the properties and he is utilizing and exploiting the same for his own benefit. She argues that in the interest of justice the application ought to be placed before a trial court before the defendant proceeds to squander the matrimonial property. That unless her prayers are granted she stands to suffer irreparable damage. She avers that the respondent will not suffer any irreparable damage or loss. That it is in the interest of justice that the orders made on 26/9/2013 dismissing Originating summons filed on 2/10/2009 be set aside and the suit be reinstated for hearing on merit.

3. The defendant/Respondent is opposed to the said application. He denies the applicant's allegations that her life was in danger and she had been forced to seek asylum in the United State of America. Adding that if the plaintiff obtained the said asylee status the same was done through misrepresentation and falsehood and she has not demonstrated any letter of complaint to the Kenyan authorities that she had reported the alleged threats adding that the applicant while in the United States of America did not bother to consult her advocate on the progress of the said matter. The respondent aver that there is no need in reviving the said suit as the properties the respondent seeks to get a share of are in joint names and some were acquired when the plaintiff was in the United States of America hence the same do not form part of the matrimonial properties. He listed the following properties;

a. L.R. Ndumberi/Riambai/1517 in joint names

b. L.R. Ndumberi/Riambai/1518 acquired after she had left the country and no longer cohabiting with the respondent.

c. L.R. Kiambaa/Kanunga/2056 - in joint names

d. Mavoko Town Block 3/7123 acquired after she had left and not cohabiting

e. Mutira/Kayugu/4462 ancestral land and a gift from the plaintiff's parents therefore not matrimonial property

f. Kwale/Ndiani/1588 acquired after the plaintiff had left and not cohabiting

g. He however denies knowledge of properties listed as H, I & K.

4. He avers that there is no case with probability of success and reviving the matter will be a waste of court's time. He opposes the re-opening of the matter 7 years after it was filed and urges the court to dismiss the applicant's application.

5. There is a supplementary affidavit by Beth Wanjiku Munyaka stating that she has been granted a power of attorney by the plaintiff to transact court business in any court of the law. She avers that that the plaintiff applied and got asylee status after going through grilling, interrogation and stringent vetting process, which was prima facie that her life was in danger. She argues that the respondent's argument that the applicant obtained the asylee status through misrepresentation holds no water.

6. She avers that the applicant has nothing to hide regarding her movement during the asylee status. She gave the applicant's movement as follows;

On 18th June 2009, plaintiff and defendant left Kenya for the USA to find a university for their daughter Beth Munyaka they arrived on 19th June 2009 and returned on 10th July 2010.

On 22nd December 2009, the plaintiff left for Australia for a visit to a relative in Australia and returned to Kenya on 12th January 2009.

On 31st August 2010, she left for USA where she was granted asylee status and stayed there for 3 years before visiting Kenya, as she feared for her life.

On 16th November 2013, she returned to Kenya to visit her children to find her daughter being married off by the defendant.

7. She points out that the applicant stayed away from Kenya for three (3) years as she feared her life was in danger. That reviving the case is important, as the parties are unable to agree on how to share the property, as they are not in communication owing to the defendant's extreme hostility. She avers that the applicant has a good case with high chances of success adding that the right to be heard is a key ingredient to the fair hearing process and the court is duty bound to give a party a chance to be heard on merit on issue that it is advancing. She avers that the application has been advanced in good time.

8. The matter proceeded for hearing and parties made oral submissions. The applicant reiterated the averments in her application adding that the applicant was an acute litigant before she left. The applicant sought to correct the respondent that the case was dismissed three years ago and not 7 years as alleged. That the suit involves matrimonial property which is being transferred and should the application be denied the applicant's right to the property will be prejudiced.

9. The defendant argues that the applicant is indolent, as she has taken too long to reinstate the matter, which was dismissed 7 years ago. Adding that the applicant though claiming her life was in danger could

have communicated through her lawyer on record at the time. He argued that most of the properties were obtained after they cohabited with the applicant hence it would be of no use to reinstate. It was argued that the plaintiff cannot claim Article 50 had been breached as she was not denied a chance to be heard adding that it was a clear case of the plaintiff abusing the court process and the court's discretion should not be exercised in her favor.

10. In the case of **Patel -vs- E.A. Carge Handling Services Ltd [1974] EA75** it was held that; *The court has unfettered, unlimited and unrestricted jurisdiction to set aside an ex-parte judgement. That the tests for setting aside an ex-parte judgement are:*

- i. *Whether there is a defence on the merits.*
- ii. *Whether there would be any prejudice to the plaintiff.*
- iii. *What is the explanation for any delay.*

11. The respondent does not deny that some of the property from part of matrimonial property. The parties appear not to agree on what forms matrimonial property and how to share out the same as such I find that there is an issue in contention that requires to be resolved by this court. The suit had been dismissed on 26/9/2013 for lack of prosecution. The applicant has explained her challenges to prosecute the matter as her life was in danger at the time leading her to seek asylee status in the USA. I find that the applicant has a case and it is only fair and in the interest of justice to give her an opportunity to be heard rather than condemn her unheard. As such, I set aside the decision of 26/9/2013 dismissing the suit and reinstate the same. Parties to take a hearing date at the registry on priority basis. Cost in the cause. It is so ordered.

Dated, signed and delivered this **16th** day of **March** 2017.

R. E. OUGO

JUDGE

In the presence of;

AbsentFor the Applicant

Mr. Alosa H/B Mr. MutwiriFor the Respondent

MS. Charity

Court Clerk