

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT NO. 15 OF 2014 (OS)

L W N.....PLAINTIFF

VERSUS

J M G t/a GARAM INVESTMENTS AUCTIONEERS.....1ST DEFENDANT

GOKHLE INVESTMENTS.....2ND DEFENDANT

RULING

1. According to the plaint herein, dated 19th September 2014, the plaintiff and the 1st respondent were once married. The 2nd defendant is a company in which the 1st defendant is said to have some interests. The suit seeks several orders relating to various businesses that the two were allegedly running during the currency of the purported marriage, declarations of certain assets and accounts with respect to rents and sales of certain assets. The defendants filed a defence to the plaint, and counter-claimed against the plaintiff. The defence and counterclaim is dated 25th November 2014. The defence comprises of mere denials of the allegations made in the plaint, while the counterclaim is in respect of a sum of money allegedly advanced by the 1st defendant to the plaintiff.

2. Thereafter the defendants filed a Motion dated 9th March 2016 seeking the striking out of the suit on the grounds that it was scandalous, frivolous, and vexatious and an abuse of the process of the court. The application is founded on the grounds set out on the face of the application, as well as the facts deposed in the affidavit in support sworn 9th March 2016 by the applicant, J N G. It is alleged that the suit is founded on falsehoods, as the substratum of the suit is an imaginary marriage between the parties. It is asserted that the two parties never lived together as man and wife. It is also alleged that the court had no jurisdiction to determine the matters raised in the plaint. It is further stated that the suit was driven by greed. It is pleaded that the suit ought to have been filed at the Employment and Labour Relations Court (ELRC). Contemporaneously filed with the Motion is a Notice of preliminary Objection dated 9th March 2016. The notice states that the issues raised in the plaint bring it within the jurisdiction of the ELRC by virtue of Article 162(2) of the Constitution.

3. In response the respondent swore a detailed affidavit on 21st April 2016, which raises both matters of law and fact. It is argued that the case for striking out a suit must be plain and obvious. It is also submitted that the preliminary objection is not dependent on facts.

4. I directed that the application and the preliminary objection would be disposed of by way of written submissions. The record reflects that the respondent filed her submissions on 11th May 2016, of even date. I have not come across any filed by the applicants. The respondent has also filed a bundle of authorities to support her case.

5. I have carefully perused the plaint filed herein. The suit it presents is founded on a purported marriage. It seeks an account from a business that the 1st defendant runs, declarations relating to property owned by the 1st defendant, an account of rent received from the residential houses owned by the 1st defendant and an account of cars that he is alleged to have sold. There is only a prayer claiming compensation for

consultancy services rendered to the 1st defendant.

6. The Motion seeks striking out of the suit on the basis of frivolity, principally on the ground that it was founded on a marriage that never existed. It is trite law that striking out of suits is a drastic measure to be taken only in plain and obvious cases. There is wealth of case law on this. I am not satisfied that the Motion before me presents a plain and obvious case for striking out. The applicant has sworn an elaborate affidavit, where he seeks to demonstrate that the suit was frivolous and founded on an imaginary marriage. The fact that he felt need to swear such a lengthy affidavit on the matter is evidence that the suit has substance. Whether or not there was a marriage is a matter of fact, which can only be established at a full trial.

7. The preliminary objection raises the question of jurisdiction, on the ground that the dispute turns on matters germane to employment, which is the province of the ELRC. A glance at the prayers in the plaint will show that there are six principal prayers. Five of them are on matters that have nothing to do with employment. Only one prayer has something close to employment. The respondent claims to have had rendered consultancy services to the applicant in respect of which she was entitled to compensation. She does not claim salary arrears or related compensation. She claims to have been a consultant, I do not think a consultant to a company or a business or business person is an employee of the person that he consults for. I do not think that the suit herein turns on the alleged consultancy, the substratum of the suit is the alleged marriage. The respondent in my understanding is principally seeking declarations on property that she alleges the 1st defendant holds in trust for her, and accounts in respect of the same property.

8. I am not satisfied that there is any merit in both the Motion and the Preliminary Objection. The same are for dismissal and I hereby dismiss them with costs. The suit on record should proceed for determination.

DATED, SIGNED and DELIVERED at NAIROBI this 12TH DAY OF MAY, 2017.

W. MUSYOKA

JUDGE