



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI

CIVIL CASE NO 1 OF 2015

JANE FLORENCE MONDAY ONYONKAPLAINTIFF

VERSUS

MARGARET ATIENO ANYWAYO1STDEFENDANT

RICHARD TIMOTHY MWAAMBI MWAWASI....2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 4th May 2015 and filed on 19th May 2015 was brought under the provisions of Section 1A, 1B, 3A, 63 (e) of the Civil Procedure Act Cap 2(sic) Laws of Kenya, Order 40, (sic) Rule 1, 2, 4 and 5, Order 51 (1) of the Civil Procedure Rules 2010 and all enabling provisions of the law. Prayers Nos (1), (2) and (3) of the said application were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. Spent.

4. THAT this Honourable Court be pleased to grant a permanent injunction restraining the 1st Respondent whether by herself, her agents and/or servants from residing, dealing, alienating and/or in any other manner, interfering and/or tampering with the following matrimonial properties pending the hearing and determination of this suit:-

a. The health facility known as "RIFLOT MEDICAL CENTRE".

b. All and any of the four (4) unit house located within the aforementioned medical centre's compound and/ (sic) grounds.

c. All that property known as Voi/Municipality Block 1/905.

d. All that property known as Chawia/Wusi-Kaya/1079.

e. All that property known as Lunga Lunga/Mahuruni/738.

5. THAT the costs of this application be provided for.

6. THAT this Honourable Court be pleased to make such further and/or other orders as it may deem fit and expedient in the circumstances of this case.

2. On 17th September 2015, the court directed the parties to file and serve their respective written submissions. The Plaintiff complied and filed her undated Written Submissions on 4th November 2015. Despite having been additional time on 9th November 2015 to file and serve their Written Submissions, the Defendants did not do so. Notably, the matter was listed for mention several times when both parties' and/or their advocates never attended court.

3. When the matter came up in court on 16th June 2016, both the 1st and 2nd Defendants had not filed their Written Submissions. The Ruling herein is therefore based on the Plaintiff's Written Submissions which she relied upon in their entirety.

THE PLAINTIFF'S CASE

4. The application was supported by the Plaintiff's Affidavit that was sworn and filed on 4th May 2015. On 17th September 2015, she also filed a Further Affidavit. The same was unsworn. The Plaintiff stated that she got married to the 2nd Defendant herein in November 1985 under the Taita Customary Law and that they were blessed with four (4) daughters. In the course of their marriage, they jointly acquired their matrimonial home and also developed some of the aforementioned properties. She also said that they formed a company namely, Riflot Medical Services (hereinafter referred to as "the Medical Centre"), the legal *persona* of Riflot Medical Centre (hereinafter referred to as "the Company").

5. It was her contention that in recent times, the 2nd Defendant, had during the subsistence of their marriage, threatened to evict her from her matrimonial home after he purportedly brought the 1st Defendant to be his second wife. She suspected that the 1st and 2nd Defendants had an adulterous affair whilst the 1st Defendant had been employed at the Medical Centre.

6. She therefore sought that her application be allowed as she would suffer irreparable loss and damage if the same was not allowed.

THE 1ST DEFENDANT'S CASE

7. In response to the said application, the 1st Defendant swore a Replying Affidavit on 21st July 2015. The same was filed on 22nd July 2015.

8. She averred that she was a wife to the 2nd Defendant and denied that she had had an adulterous relationship as had been contended by the Plaintiff. She said that although she had been an employee at the Medical Centre, the Plaintiff had been aware of her relationship to the 2nd Defendant because early on in that relationship, the 2nd Defendant took her to the Plaintiff's house at Mombasa where she spent a night. She added that since 2012, her child had been spending time at the Plaintiff's Mombasa home.

9. She denied that the 2nd Defendant was planning to transfer property to her son. She stated that she had never demanded that the said property be registered in her joint names with the 2nd Defendant who she said was her husband despite having acquired the property jointly with him. She attributed the change of the Plaintiff's attitude and that of her daughters to jealousy as she had a son while the Plaintiff had none.

10. She was adamant that as a wife to the 2nd Defendant, she had every right to be with him and to also access the Medical Centre and other properties/assets. She thus urged this court to dismiss the Plaintiff's application as the orders sought were unenforceable, misplaced and a clear abuse of the court process.

THE 2ND DEFENDANT'S CASE

11. On his part, in response to the said application, the 1st Defendant also swore a Replying Affidavit on 21st July 2015. The same was filed on 22nd July 2015.

12. He stated that the Plaintiff was not his first wife or only wife as he had been legally married to one Lucy Wanyika at ACK Church Makupa. He contended that the Plaintiff, with whom he had four (4) daughters, was still his wife as was the 1st Defendant with whom he had a son. He was emphatic that the Plaintiff could not treat the 1st Defendant as “a nobody” as he had married both of them under the Taita customary law.

13. He pointed out that he acquired several properties with his first wife and that titles were only issued to him many years later. He also stated that he acquired the Medical Centre alone as the Plaintiff did not contribute anything to its setting up and that the Letters of Allotment were in his names. He said that he only invited the Company to construct on the plot.

14. He said that the Medical Centre was not a matrimonial home and was emphatic that the same was set up as a business for the family. It was his contention that the Company was incorporated as both the Plaintiff and the 1st Defendant were medics and that he had ensured that his daughters were trained as medical professionals so as to manage the Medical Centre. He was categorical that the Plaintiff could not now claim what belonged to the family for her personal benefit.

15. He therefore opposed the application herein on the ground that the orders could not be granted without flouting the law and his legal rights as well as those of the 1st Defendant.

LEGAL ANALYSIS

16. Having set out the parties' positions in detail, it was evident that the dispute herein was a family dispute, a dispute between a “wife” against her “husband” and a person, her “husband” acknowledged as his “wife.” Evidently, the relationship between the Plaintiff and the 2nd Defendant was contended to have been through a customary marriage, which arrangement both the 1st and 2nd Defendants contended obtained in their cases.

17. According to Section 3 (1) of the Marriage Act, 2014, marriage has been defined as follows:-

“Marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act (emphasis court).”

18. The 2nd Defendant did not tender any documentary evidence as proof that he had been married to the said Lucy Wanyika in accordance with the rites of the Christian denomination, namely in the ACK Church. This court was therefore unable to state with certainty if her marriage to the 2nd Defendant was monogamous in nature noting only that it were so, then the purported marriage between the Plaintiff and the 2nd Defendant was of no legal effect having been contracted after a monogamous marriage between the 2nd Defendant and the said Lucy Wanyika. The court will say no more on this issue as it was not a matter for its determination.

19. A marriage which is in accordance with the customary rites relating to any of the communities in Kenya may be registered under Section 6(1)(c) of the said Marriage Act. The registration of such customary marriage is compulsory as can be seen in Section 96(2) and (3) of the Marriage Act that provides as follows:-

“(2) Parties to a marriage contracted under customary law, the Hindu Marriage and Divorce Act (Cap. 157) (now repealed) or the Islamic Marriage and Divorce Registration Act (now repealed) before commencement of this Act, which is not registered shall apply to the

Registrar or County Registrar to assistant Registrar for the registration of that marriage under this Act within three years of the coming to force of this Act.

(3) The parties to a customary marriage shall register such a marriage within three years of the coming to force of this Act.”

20. The Plaintiff did not adduce any evidence to demonstrate that indeed her customary marriage to the 2nd Defendant had been registered as provided hereinabove. In view of the uncertainty of the relationship between the 2nd Defendant and the said Lucy Wanyika and the fact that the Plaintiff did not demonstrate to this court that her Taita customary law marriage to the 2nd Defendant had been registered in accordance with the Marriage Act, the Plaintiff could not rely on the provisions of the Marriage Act or the Matrimonial Property Act, 2013. On this ground alone, this court found and held that the Plaintiff could not benefit from the equitable relief of injunction as against the 2nd Defendant herein.

21. It was apparent that the parties herein were in agreement that the Medical Centre was established pursuant to the incorporation of the Company. Object No (3) (a) of the Company’s Memorandum and Articles of Association shows that the said Company was established **“to establish a clinic for medical consultation, health examination and evaluation to carry out curative and preventive medical treatment and general enhancement of health...”**

22. The Plaintiff did not annex to her Supporting Affidavit a copy of the Company’s Articles of Association. The Plaintiff’s and the 2nd Defendant’s number of shares were not indicated on page 8 of the said Company’s Memorandum of Association. Be that as it may, it was evident that both the Plaintiff and the 2nd Defendant intended that the affairs of the said Company were to be governed as provided for in the Company’s Articles of Association.

23. For that reason, any dispute relating to the said Company could only be resolved as provided for in the Companies Act Cap 486 (Laws of Kenya). It could not be deemed to have been a family dispute. This court was once again not persuaded that the Plaintiff was entitled to the relief of injunction merely because she incorporated the said Company with the 2nd Defendant as a “husband” and “wife” as the modalities of resolving disputes between shareholders and/or directors was clearly provided for in the law.

24. The question of whether or not the Plaintiff and the 2nd Defendant jointly acquired the property during the subsistence of their purported marriage cannot be made at this stage for the reason that this court would be interrogating very substantive issues based on affidavit evidence. This is particularly important as the 2nd Defendant admitted that he had two (2) other “wives” apart from the Plaintiff. Indeed, the question of the acquisition of property and the question of the relationships by and between the parties herein were issues for trial.

25. At this point in time, this court’s interest is only limited to establishing whether or not the Plaintiff had established a good case to be granted the orders that she had sought in her said application. In doing so, this court had due regard to criteria for granting an interlocutory injunction that was set out in the case of **Giella vs Cassman Brown & Co Ltd [1973] E.A. 358** in which it was held as follows:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

26. Evidently, the power by the court to grant an interlocutory injunction is a discretionary one. It must be based on the law and evidence. Having considered the circumstances of the said matter, the affidavit evidence and the written submissions and the case law that was relied upon by the Plaintiff, this court was

not persuaded that the Plaintiff was entitled to the orders that she had sought in her application as she did not demonstrate that she was being evicted from the house that she currently resides in at Mombasa. Indeed, apprehension without proof of likelihood of loss or damage being occasioned is not a sufficient ground for a relief of an injunction to be granted.

27. Accordingly, having held that the Plaintiff had not made out a *prima facie* case with a probability of success, the court found that the question of her suffering loss that could not be compensated by way of damages if the interlocutory injunction was not granted did not arise. Consequently, the balance of convenience would not tilt in her favour.

28. As an obiter, the court wishes to point out that it found the pleadings herein to have left a lot to be desired. The Plaintiff's copy of the Further Affidavit that was filed in court on 17th September 2015 was not sworn in accordance with the mandatory provisions of Section 5 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya) which provides as follows:-

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

29. For the foregoing reason, this court did not take into account any of the averments contained in the said Further Affidavit because it is a statutory requirement that all affidavits must be commissioned by a commissioner for oaths. The omission to have the said Further Affidavit commissioned by a commissioner for oath was not a procedural technicality that the court could overlook in line with the provisions of Article 159 (2)(d) of the Constitution of Kenya, 2010.

30. However, the court considered the Plaintiff's undated Written Submissions as it is was of the opinion that the lack of a date was a procedural technicality which it could overlook purely for purposes of administering justice as Article 159 (2)(d) of the Constitution mandates courts to administer justice without undue regard to procedural technicalities.

DISPOSITION

31. For the foregoing reasons, the upshot of this court's ruling was that the Plaintiff's Notice of Motion application dated 4th May 2015 and filed on 19th May 2015 was not merited and the same is hereby dismissed.

32. As the matter herein involved parties who were closely related by “marriage” and there were children born out of the distinct relationships, each party is hereby ordered to bear its own costs.

31. It is so ordered.

DATED and DELIVERED at VOI this 1st day July of 2016

J. KAMAU

JUDGE