REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAIROBI

FAMILY DIVISION

HCCC NO. 57 OF 2011

N U F R……..APPLICANT

VERSUS

M S C…….….RESPONDENT

RULING

1. There are two applications for determination. The first in time is a Chamber Summons dated 18th October 2011 and filed in court on 19th October 2011, and the other is a Notice of Motion dated 3rd April 2012.

2. In the first application the applicant prays for several orders. They can be classified into two categories. The first category seeks orders for the maintenance of the applicant. She would like the respondent ordered to pay to her a sum of Kshs. 27, 000, 000.00, being arrears of maintenance for the period running from October 2010 to September 2011. She also seeks that the respondent pays her a monthly maintenance of Kshs. 2, 250, 000.00, or such other amount as the court may determine, with effect from 0ctober 2011 pending the hearing and determination of the petition herein. The second category of prayers seek restraining orders to bar the respondent from disposing of or dealing with properties listed in the application in a manner adverse to the interests of the applicant during the pendency of the suit.

3. The application is premised on the grounds on the face of the application. It is supported by the affidavit of the applicant.

4. The respondent opposed the application and filed a replying affidavit sworn on 2nd November 2011. In that affidavit the respondent avers that he never married the applicant and that he did not participate in any Islamic marriage ceremony with the applicant on the night of 27th September 2010 at the Diamond Plaza as claimed, or at all, and the alleged marriage is a fabrication by the applicant and her witnesses.

5. Having considered the application, the affidavits in support and the replying affidavits, and the oral arguments by the parties, I do note that although the application is very elaborate, it mainly seeks maintenance and injunctive orders.

6. The second application is taken out under Order 39 rules 1(a) (ii) (iii) (b), 2 (i) (2), 4, and 5 (i) (2), and Order 40 of the Civil Procedure Rules, the Constitution of Kenya, and all other enabling provisions of the law. Several orders are sought in that application. There are two prayers in connection with release of funds to the tune of Kshs. 150, 000, 000.00 for a reconstructive surgery on the applicant. Another prayer

is for deposit of a sum of Kshs. 3, 000, 000, 000.00 in court as surety or such other amount as the court may deem appropriate. There are further prayers that the applicant do deposit his travel documents in court and that he be barred from traveling out of the country if he fails to comply with the court orders to be given in these two applications. The applicant also prays that she be granted leave to cite the respondent for contempt if he fails to comply with the orders to be granted by the court.

7. There is a further prayer that cautions be placed on the respondent's bank accounts and all his properties and investments, and for restraining orders to issue to restrain dealings with those accounts and investments. She also seeks that the Commissioner of Police and the Director of Criminal Investigations be ordered to arrest the respondent and to charge him in court with the offence of assault and causing grievous harm to the applicant, and of various other offences set out in the prayer. There is also a prayer directed at the Registrar of Lands and the Registrar of Companies that they be ordered to investigate the status of the assets set out in the application. She would like an order directing the banks stated in the application to provide statements of accounts on all bank accounts operated by the respondent from 2008 to date.

8. The grounds upon which the second application is grounded are on the face of the application. The application is further supported by the affidavit of applicant, sworn on 3rd April 2012.

9. Opposing the application the respondent filed in a replying affidavit sworn on 18th April 2012. He denies the allegations and makers among other averments that he has always been eager, ready and willing to have this matter heard and determined with finality, only for the applicant to keep on introducing side-shows. He further states that the applicant is on a fishing expedition by the very nature of her prayers and that the orders sought are incapable of being granted as framed, as court orders are never issued in vain, and it is incumbent upon the applicant to avail the relevant evidence of her claim. Further, he states that the applicant has not established the legal basis upon which her prayers are anchored or premised, to warrant the issuance of such drastic orders at the interlocutory stage of the suit.

10. The two applications were argued based on affidavits and oral evidence. The applicant and the respondent presented themselves for cross-examination, and were cross-examined.

11. The central issue for determination is whether the applicant was married to the respondent. The question as to whether the applicant is entitled to the orders she seeks in the application dated 18th October 2011 depends entirely on whether there was a valid marriage between the applicant and the respondent, for the respondent would only be obliged to provide for the applicant if there existed a valid marriage between them. The two applications will stand or fall depending on whether marriage between the parties hereto is proved.

12. The applicant advances two positions. The first one is that she initially cohabited with the respondent in circumstances from which the court should make the presumption that there arose a marriage between them by repute. The second position is that thereafter the parties went through a ceremony of marriage under in an Islamic Law.

13. On the cohabitation prior to the alleged celebration of the marriage under Islamic law, the applicant has in her application attached a number of documents as evidence that circumstances existed from which a presumption of marriage could be made. There are several affidavits by persons who allegedly interacted with the parties. There is an affidavit sworn on 11th October 2011 by Ruhina Parveen Yakub and another sworn on 16th November 2011 by Kennedy M Mayaka. There are also several witness statements by persons who claim to have been acquainted with the parties at the material time. These include those made by David Bosire, Kenneth Mayaka, Livingston Wafula, Polycarp Ongwae, Shedrack M Mwema, Alex Ongiya, among others.

14. None of the persons who swore the affidavits referred to in paragraph 13 above were cross-examined at the hearing of the applications, and the averments made in their affidavits were not tested by way of cross-examination. Neither did the persons who made the statements referred to above testify and subject

themselves to cross-examination.

15. The applicant is inviting me to find that a marriage arose between her and the respondent on account of prolonged cohabitation. Presumption of marriage is a creature of the common law. The principle states that where a man and a woman have cohabitated for such a length of time and in such circumstances as to have acquired the reputation of being a man and a wife, a lawful marriage may be presumed though there may be no positive evidence of any marriage having taken place and the presumption can only be rebutted only by strong and weighty evidence to the contrary. The resultant union is called a presumed marriage. It is a 'judge-made' marriage which is presumed to bring about consequences of marriage to a situation where a man and woman have lived as though they were married, having not fulfilled the formal requirements of marriage.

16. The presumption is made both where there is some evidence of a marriage ceremony of some sort having been performed followed by cohabitation as husband and wife and also where there is no evidence of any sort of marriage ceremony but there is evidence of cohabitation by and acceptance of the parties by the community as such.

17. The principle was stated by Cranworth J in *Breadalbane* (1867) LR 1 HL, to the effect that if upon the death of persons who had cohabited without a formal ceremony of marriage a succession opened to their children, anyone claiming a share in the such succession as a child would establish a good *prima facie* case by showing that parents had always passed in society as a man and his wife, and that the claimant passed as their child. He added that marriage can only exist as a result of mutual agreement. The conduct of the parties and of their friends and neighbours, as to their habits and repute, affords strong evidence that at some unascertained time a mutual agreement to marry was entered into by the parties passing as man and wife. Habit and repute was said to be generally conclusive evidence of marriage, unless the same is met by counter evidence.

18. The common law presumption of marriage has been imported into the Kenyan law by the reception clause as embodied in section 3(2) of the Judicature Act. The first recorded case of its application is in the case of *Hortensia Wanjiku Yawe vs. The Public Trustee* Nairobi CACA No. 13 of 1976. In that matter, the parties had cohabited from 1963 to 1972 when the man died. The woman claimed his estate as his widow under customary law. The Public Trustee then moved the court asking for a determination as to whether the woman was the widow of the deceased. The court did not consider whether or not the essentials of a Kikuyu customary law had been complied with, but considered the circumstances of the parties cohabitation - that the man had orally and in writing described the woman as his wife, the community treated the couple as husband and wife, the mother of the man knew the woman as her son's wife, among others. The court concluded that the fact of the long cohabitation as man and wife gave rise to the presumption of a marriage in favour of the woman, which presumption could only be rebutted or displaced by cogent evidence to the contrary.

19. Marriage creates a family, which is the most basic unit of society, a fact recognized in Article 45 of the Constitution of Kenya 2010. Much as marriage is treated as a private affair, it has a very strong public element. It is for this reason that society makes rules to regulate the creation and protection of the family. The formal creation of a marriage is regulated by state, religious and customary laws and the events that signify the start of a family are affairs that involve more people than just the two individuals involved. It is a communal affair, involving the two individuals, their families and friends.

20. This is not lost when it comes to presumption of marriage. A presumed marriage is often referred to as marriage by reputation. One of the considerations is how the couple is viewed and treated by their community. Community here would mean the families of the two parties, their friends, neighbours and acquaintances. The public element of marriage again comes to the fore. A determination as to whether a marriage may be presumed from cohabitation will of necessity be dependent on the portrait the parties have painted in the eyes of the community around them.

21. The material that was placed before me at the hearing of the applications came from the testimony of the parties themselves, based on their respective affidavits and the oral evidence elicited from their cross-

examination on the contents of the said affidavits. The applicant had the burden to marshal evidence from which I could decide whether to declare existence of a marriage from prolonged cohabitation or not. She did her best in adducing such evidence, unfortunately the element of reputation or what may be referred to as the community view of the cohabitation fell short. Evidence of the community element can only be adduced by members of the community themselves. There is same material on record on that, going by the affidavits and the statements I mentioned in paragraph 13 above, but that material is not admissible. The makers of those affidavits and statements must present themselves in person to testify and to be confronted by the respondent.

22. I find myself unable to find that a marriage could be presumed from the circumstances of the two parties without the testimony of the deponents of the affidavits that were placed before me by the applicant and the makers of the statements that are filed in the cause. A determination on the matter can only be made at the conclusion of a full trial where all the material is properly placed before the court.

23. I need to emphasize that marriage creates a family, a basic and fundamental unit of society. Family brings with it immense obligations on all the parties involved. Marriage is a serious matter, and issues touching on it must be approached with appropriate caution. This therefore obliges a party who approaches the court to declare marriage out of reputation or prolonged cohabitation to marshal adequate and concrete evidence upon which the court can confidently make the declaration sought. Such evidence can ideally only be adduced at the full trial.

24. The applicant also alleges to have gone through an Islamic ceremony of marriage with the respondent. The said ceremony is said to have conducted on the night of 27th September 2010 at the Diamond Plaza in Parklands. The applicant says that two witnesses were present. The said witnesses are named as Sheikh Abdullahi Tiva and Harun Ali Shee Mwakoyo. Their statements are on record, they are dated 14th May 2012 and 15th May 2012, respectively, and they were filed in court on 21st May 2012. The ceremony was allegedly presided over by a Sheikh Swaleh from a local mosque.

25. The respondent has vehemently denied that such ceremony took place. He has asserted that he did not marry the applicant in any Islamic ceremony on 27th September 2010 or at all.

26. At the time of the alleged celebration of the Islamic ceremony of marriage on 27th September 2010, the governing law was the Mohammedan Marriage Divorce and Succession Act, Cap 156 Laws of Kenya, and the Mohammedan Marriage and Divorce Registration Act, Cap 155 Laws of Kenya. These statutes have since been repealed following the commencement of the Marriage Act, No. 4 of 2014, on 20th May 2014. They are however the statutes to apply in determining whether the ceremony of 27th September 2010, if at all there was one, was a valid Islamic ceremony of marriage which solemnized a marriage between the parties hereto.

27. A Muslim marriage is defined in section 2 of the Mohammedan Marriage Divorce and Succession Act to mean any marriage contracted in accordance with and recognized as valid by Mohammedan law. The legislation on Mohammedan marriages does not contain any substantive provisions on the rights of the parties with respect to. These rights are governed by the Koran and the legal rules applicable to the particular sect to which the parties belong. The courts depend on Islamic scholars and Islamic scholastic works on the content of Islamic marriages. What constitutes an Islamic marriage is therefore a matter of fact to be proved strictly.

28. The Mohammedan Marriage and Divorce Registration Act required registration of all Muslim marriages within seven days, at the office of the registrar of Islamic marriages. The registrar had to be satisfied before registering the marriage as to the identity of the parties, the capacity of the parties and that the marriage did actually take place. Once the marriage had been registered the parties and two witnesses who witnessed the marriage were required to sign the register. However, section 24 of the same Act provided that the fact that parties omitted to register their marriage did not invalidate that marriage and where marriage was invalid, registration of a marriage did not validate it.

29. The evidence on record is to the effect that the marriage allegedly celebrated on 27th September 2010 was not registered under the Mohammedan Marriage and Divorce Registration Act. There is therefore no documentary proof of its existence.

30. The effect of the non-registration of the alleged marriage requires that the same be proved at a full trial, where either the official who presided over the ceremony or the persons who acted as witnesses would be required to testify. The alleged marriage having been purported to be an Islamic marriage, the applicant is obliged to establish that the said ceremony was in conformity with Islamic law on marriage and that it resulted in a valid Islamic marriage. There is material on record which suggests that that is what the applicant proposes to do at the full trial. There are statements on record of the persons who she alleges were the witnesses to the marriage at the ceremony and who she wishes to call at the trial.

31. For now I cannot make a determination as to whether there was a valid Islamic ceremony of marriage conducted on 27th September 2010 and which culminated in the marriage of the applicant by the respondent under Islamic law. Such determination can only be made after the conduct of a full trial, where the applicant ought to marshal evidence to establish that there was indeed a contracted a marriage between her and the respondent which was in accordance with and recognized as valid under Islamic law.

32. The law on interlocutory injunctions is well settled in *Giella vs. Casmann Brown & Co. Ltd* (1973) EA 358. In order to satisfy the court that she is entitled to an injunction, the applicant must first demonstrate to the court that she has a *prima facie* case with a probability of success. In the case of ***Mrao vs. First American Bank of Kenya Limited & 2 Others*** **(2003) KLR 125**, the court described a prima facie case as thus:

> ***"A prima facie case in a civil application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."***

33. The applicant alleges that she was married to the respondent and that is what forms the basis of this application, a fact that the respondent has vehemently opposed. Unfortunately, in the circumstances, the issue of marriage will have to be determined at the main suit and cannot be dealt with at an interlocutory stage as it requires calling of evidence. The applicant at this stage has not demonstrated to the satisfaction of this court that she has a *prima facie* case with probability of success.

34. Secondly, the applicant must demonstrate to the court that unless the orders sought were granted she would suffer loss and damage which cannot be compensated by damages. From the affidavits presented before this court, the court forms the view that the respondent is an established business man, and will be in a position to compensate the applicant if it is found that an injunction should have been granted. Again, the applicant has failed to demonstrate to the satisfaction of this court that she would suffer loss and damage which cannot be compensated by damages. No material was brought before the court as to the irreparable loss.

35. Thirdly, if there was any doubt in the mind of the court about the question as to whether or not compensation would be an adequate remedy, the court would determine the application on the basis of balance of convenience. Having found that no *prima facie* case with probability of success has been established, I need not go to the third limb.

36. In light of the above, I find that the application dated 18th October, 2011 fails and is available for dismissal.

37. Coming to the second application, dated 3rd April 2012, I have given due consideration to the affidavits for and against the application, as well as the legal provisions under which the application is brought. First and foremost, I have observed that the applicant has invoked various provisions of the Constitution and other laws in her applications, most of which have no nexus to the orders sought. It is

obvious that the said application is omnibus.

38. In *Rajput vs. Barclays Bank of Kenya Ltd & 3 Others* (2004) 2 KLR 393, the court expressed itself as follows on omnibus applications:-

> *"There is no doubt the application is an all-cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught it, there will be one or two edible crabs, or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, it is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court need to consider before granting the entire relief sought. This alone makes the plaintiff's application incurably defective, and a candidate for striking out."*

39. The applicant has touched on matters that are criminal in nature, matters that would ordinarily go to a criminal court, and not the family court. However, the court looks at applications on the basis of their own merits. Is the instant application merited?

40. It is my opinion that the applicant has not demonstrated that the respondent intends to delay the final determination of the suit, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him. The applicant has not demonstrated that the respondent has absconded or left the local limits of the jurisdiction of the court or is about to do so. No evidence was adduced to demonstrate that the respondent has disposed of or removed his property from the local limits of the jurisdiction of the court. To that extent, the court cannot grant the orders sought herein as nothing would justify the granting of such orders in the circumstances of the application.

41. I have noted that the applicant marshaled impressive evidence of the extent of the respondent's investments in Kenya, which no doubt are worth billions of shillings. A person with such extensive investments cannot possibly be a flight risk. It is inconceivable that a multi-billionaire, for that is what the applicant has painted the respondent to be, would abandon his vast and lucrative business empire in Kenya to escape from a matrimonial suit initiated by a party who is yet to establish that she was validly married to him.

42. Has the applicant demonstrated to this court that the respondent has disobeyed any order of the court that would warrant granting some of the orders sought? I do not think so. A court of law cannot act on bare allegations of the applicant unless the allegations have been established by credible evidence. The applicant has not shown in her affidavit or otherwise that the said properties are in danger of being wasted, damaged or alienated by the respondent, neither has the applicant shown that the respondent has threatened or intends to remove or dispose of the alleged properties. Had the applicant demonstrated to the satisfaction of this court, then this court would have made appropriate orders. As it is, there is no act nor are there acts of the respondent that would require restraining orders. I agree with the respondent that the applicant has not demonstrated and adduced evidence to support her prayers in the instant application.

43. The applicant has asked for release of money to her by the respondent for a reconstructive surgery. Ideally such an order is not for granting in a suit of this nature. The applicant ought to have pursued this prayer in a civil suit since the claim is founded on the tort of assault and battery. It has nothing to do with matrimonial property which is the central theme of the suit before me. In any event such order cannot be made at the interlocutory stage of a suit. The applicant must first establish at a full trial that the respondent is liable in tort for her injuries and is obliged in law to pay for the injuries therefore and to fund her reconstructive surgery.

44. Consequently, I find that there is nothing in the application dated 3rd April 2012 that would enjoin me to grant the orders sought. This application too is for dismissal.

45. I accordingly dismiss the applications dated 18th October 2011 and 3rd April 2012. Costs shall be in the cause. To move this matter forward, I direct that the main suit be fixed for hearing as a matter of

priority. A date for its hearing shall be given at the delivery of the ruling.

DATED, SIGNED and DELIVERED at NAIROBI this 6th DAY OF February 2015.

W. MUSYOKA

JUDGE

In the presence of Ms. Rajput for the applicant in person.

In the presence of Mr. Mwangi for respondent advocate for the applicant.