



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 460 OF 1998

JOYCE MUKULU KILONZO PLAINTIFF/RESPONDENT

VERSUS

BENARD KILONZO KATIKU DEFENDANT/APPLICANT

RULING

1. The application dated 5/7/2007 is brought under **Order XVI Rule 6, Order XXIX Rule 4 and Order L Rule 1** of the **Civil Procedure Act** and all other enabling provisions of the law.
2. The application seeks orders that the injunction issued by this court be discharged, varied and/or set aside.
3. The application is supported by the affidavit of the Defendant/Applicant, **Benard Kilonzo Katiku** sworn on 5/7/2007. According to the said affidavit, the Plaintiff filed this suit in the year 1998 and on 21/1/2001 obtained an order of injunction restraining the Defendant from selling or disposing of properties namely **Machakos/Kiandani/344, Machakos/Kiandani/2128, Machakos/Kiandani/2312, Machakos Town/block 11/429 and Masii/Mithini/219**. The Applicant's complaint is that after obtaining the order of injunction, the Respondent went to sleep and has taken no steps to prosecute the suit. The Applicant has further averred the said properties are his only investment and that the said orders of injunction have denied him the enjoyment of his property.
4. The Respondent, **Joyce Mukulu Kilonzo** swore a replying affidavit on 8/6/2009 and on 23/9/2008 filed a Notice of Preliminary Objection stating that the application is incompetent and bad in law in that it is drawn and filed in contravention of **Order III rule 6 & 7** of the **Civil Procedure Code**.
5. The Respondent averred in the replying affidavit that the Applicant is her former husband whom she married in the year 1970. That the suit properties are matrimonial properties but are registered in the Applicant's name. According to the Respondent, she filed the present suit for orders of injunction while she prepared to file divorce proceedings and thereafter seek distribution of the matrimonial properties. The Respondent deponed that the Applicant deserted her and went to cohabit with another woman then started selling the properties that he had acquired with the Respondent. However, the Applicant later petitioned the court for a divorce and the Respondent cross-petitioned, resulting in the dissolution of the marriage on 5/7/2005. That there have been attempts to seek an amicable sharing of the remaining matrimonial properties and settle this suit but that the Applicant seemed intent on having the orders of injunction herein discharged then move to dispose of the matrimonial properties and deny the Respondent her share. The Respondent's stand is that she has now instructed her advocate to institute appropriate proceedings herein to facilitate the distribution of the matrimonial property.
6. The application and the Preliminary Objection were canvassed by a way of written submissions. I have duly considered the said submissions. There is no mention of the Preliminary Objection in the submissions and the same seems to have been abandoned.

7. It is not in dispute that the Applicant and the Respondent are former husband and wife who divorced in the year 2005. The suit herein was instituted prior to the divorce proceedings. Indeed the Respondent admits in paragraph No. 6 of the replying affidavit that she filed the suit herein to preserve the matrimonial properties while she prepared to file divorce proceedings. Subsequent to the dissolution of the marriage, the Applicant filed **HCC Machakos 276/09** (Originating Summons) for orders of division of matrimonial property.
8. The suit herein has been relatively active over the many years that it has been pending. The case has been fixed for hearing in years 2002, 2003, 2004, 2005, 2008, 2009, 2010 and 2011. It is therefore not a suitable case for dismissal for want of prosecution.
9. The final prayers in the suit herein are as follows:-
 - i. **“An injunction to restrain the defendant from selling the matrimonial property.**
 - ii. **(A) A declaration that the plaintiff is entitled to or, part of Matrimonial property.**
 - iii. **(B) An order that the sale of plot No. MKS TOWN BLOCK 11/429 whose title was signed on 3rd December 1998 was fraudulent and ought to be nullified.”**

Although the proceedings for the division of the matrimonial property have been instituted, the injunctive orders and the declaratory orders *inter-alia*, sought in the plaint will not resolve the dispute between the parties herein. What the parties require is to have the proceedings on the division of matrimonial properties expedited so that the dispute between them can be resolved.

10. The parties herein ought to have heeded the ruling by **Hon. J.W. Mwera J**, (as he then was) delivered on 25/1/2001 wherein the Honourable Judge stated, *inter-alia*, **“...if the litigants here can no longer come back to live as husband and wife any more, they would do well to institute due matrimonial proceedings wherein the fate of their marriage plus other attendant aspects like properties are thrashed out.”** The court at that time was hesitant to send the Plaintiff/Respondent away empty handed and issued the orders of injunction to preserve the properties.
11. Any orders to discharge, vary and/or set aside the orders of injunction herein will not bring this suit to a conclusion. The most appropriate step forward is to put in place preservative orders in the matrimonial property suit, then mark this suit settled or in the alternative to have the two suits consolidated so that they can be heard as one.
12. With the foregoing, the application has no merits and is dismissed. Each of the parties has contributed to the scenario herein, hence the multiplicity of suits. Each party will therefore meet their costs of the application.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **13th** day of **February** 2014.

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B. THURANIRA JADEN

JUDGE