



REPUBLIC OF KENYA
IN THE HIGH OF KENYA
AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MILIMANI LAW COURTS
MISC. CIVIL APPLICATION NO.644 OF 2012
(FORMERLY MISCELLANEOUS CIVIL APPLICATION NO.487 OF 2011)
RITA MARIA HURLIMANN.....PLAINTIFF/APPLICANT
VERSUS
RODGERS MWABONJE KADOSHO.....1ST DEFENDANT
ASHARI APARTMENTS LIMITED.....2ND DEFENDANT
RULING

1. The Motion for consideration is dated 13th January, 2012, by the Plaintiff. It is expressed as being brought under Sections 146 – 149, 155 – 159, 165 – 169, 197 – 198 of the Companies Act, Cap.486, Rules 3 and 5 of the Companies (High Court) Rules, and Section 3A of the Civil Procedure Act. The same seeks a total of eleven (11) prayers ranging from restraining the Defendants from interfering with the Plaintiff's participation in the running of the 2nd Defendant, to the appointment of an inspector and valuation of the 2nd Defendant's assets. The detailed grounds for the application were set out in the body of the application and the Supporting Affidavit of Rita Maria Hurlimann sworn on 13th January, 2012.

2. The Applicant contended that she and the 1st Defendant are man and wife, sole shareholders and directors of the 2nd Defendant (hereinafter "*the Company*") that the parties consented to proceed by way of this litigation other than arbitration as stipulated in the Articles of the Company. That the personal relationship of the Applicant and the 1st Defendant had completely deteriorated and the latter had sidelined, prevented and locked her out of the activities, operation and business of the Company. That the 1st Defendant had breached his statutory duty of disclosing to her the financial affairs or forward to her the balance sheet or audit reports of the Company.

3. The Applicant further alleged that, the 1st Defendant had refused to disclose to her the Company's bank accounts thereby preventing her from knowing the status of the Company's accounts. That the 1st Defendant had ignored requests to calls for meetings, that he had run the Company with absolute secrecy notwithstanding that the Applicant was the sole financial contributor in the incorporation and setting up of the Company and held 50% shareholding therein. It was contended that the 1st Defendant intended to perpetuate the alleged wrongful acts unless restrained.

4. Further, the Applicant deponed that she and the 1st Defendant were engaged in divorce proceedings in the **NBI High Court Divorce Cause No.73 of 2009**. That the Company owns a hotel known as “**Ashari Hotel**” that at incorporation, the 1st Defendant was employed as a hotel receptionist and was of weak financial status and that the Applicant only included him as a co-owner of the property for purposes of convenience and as a spouse.

5. As to the objections raised by the Defendants, the Applicant contended that the issue of place of suing and forum for resolution of the dispute had been conclusively resolved before Rawal J (as she then was) on 8th December, 2011. That the present proceedings were not about the properties owned by the Applicant and the 1st Defendant as individuals but about her participation in the running of the Company. That the case filed at Mombasa was about division of the properties and that divorce proceedings were about dissolution of marriage and the issues raised therein were not similar to the issues raised herein. That the Company cannot be a party to either the Mombasa Case or the divorce proceedings.

6. In his written submissions dated 12th March, 2012 and 13th November, 2013, respectively, Counsel for the Applicant submitted that by the consent of the parties recorded on 8th December, 2011, the parties agreed to have the dispute herein determined by the Court rather than through arbitration. That by dint of that consent, the Originating Notice of Motion that commenced these proceedings became spent and the current Motion became statement of claim. Counsel set out four issues that in his opinion arose for determination. These were whether the present Motion was sub-judice the Originating Notice of Motion dated 16/11/11, Mombasa HCCC NO.3 of 2011 and NRB Divorce Cause No.73 of 2009 and whether the applicant was entitled to the Orders sought.

7. As to whether the Motion is sub-judice, the Originating Motion dated 16/11/11, Counsel submitted that it wasn't as the substantive prayer in that Originating Motion was reference of the dispute to arbitration. That once the parties agreed to have the dispute determined by the Court, the Originating Motion became spent and the current Motion became a statement of claim as would have been filed before the Arbitrator. As to the position of these proceedings *vis a vis* **Msa HCCC NO.3 of 2011**, Counsel submitted that the Mombasa Case was brought pursuant to the Provisions of Section 7 of the Married Women Properties Act and did not touch on the Company. He cited the Case of **Lilian Njeri Mungai -vs- Dr. Njoroge Mungai CA NO.19 of 1995 UR** in support of this proposition. That the issues in both cases were different and the jurisdictions exercisable in both cases are distinct. That the Mombasa suit is a non-starter having been brought by a man and that the Company is not a party thereto. That in any event, the consent of 8th December, 2011 determined the issue of staying these proceedings.

8. On whether the application is sub-judice NBI High Court Divorce Case No.73 of 2009, Counsel submitted that the issues between the two are distinct. That there was no prayer for determination or division of matrimonial property in the divorce proceedings. And on the final issue as to whether the applicant is entitled to the orders sought, it was submitted that the matters deponed to by the Applicant in her affidavit were not sufficiently controverted as the 1st Defendant only made general denials. Counsel urged that the application be allowed.

9. Opposing the application, the Defendants filed a Replying Affidavit of Rogers Mwabonje Kadosho sworn on 24th February, 2012, a Preliminary Objection dated 22nd February, 2012, Grounds of Opposition dated 24th February, 2012, and written sub-missions dated 20th April, 2012. the Defendants contended that the Motion was sub-judice **MSA HCCC NO.3 of 2011 (O.S)** filed on 31/10/2011 which seeks distribution of all matrimonial properties, that the said properties included the shares of the Company and its assets. That in the premises the Motion should be stayed by dint of Section 6 of the Civil Procedure Act. That Prayer No.2 of the Motion did not satisfy the principles set out in **Giella -vs- Cassman Brown**.

10. In his Replying Affidavit, the 1st Defendant reiterated his averments in his Affidavit of 7th December, 2011. He denied all the factual matters alleged by the Applicant and in particular that he had sidelined or prevented her from the affairs of the Company. He asserted that the Company was not engaged in any business and that it did not own any property. That the Company was not trading as it was for all

purposes a partnership between him and the Applicant as man and wife. That the issue of division of all matrimonial properties was a subject of **MSA HCCC NO.3 of 2011 (O.S)** which had been filed on 31/10/11 and was still pending. That the said properties are also the subject of Divorce Cause No.73 of 2009 between the parties. That before the parties were estranged in 2009, they had operated as partners and never as a Company and ever since estrangement they have operated as individuals. That before 2009, the Applicant exclusively controlled the business of guest room in plot no.7467/I/MN and she should account for the period between incorporation and 2009.

11. In his written submissions, Learned Counsel for the Defendants submitted that there were (3) issues for determination, to wit, whether the Applicant had properly invoked the jurisdiction of this Court; whether the application was sub-judice /*Res Judicata* the originating Notice of Motion dated 16/11/2011 and finally whether the Applicant was deserving the Orders sought. On the first issue, Counsel submitted that there was no substantive proceedings before Court by way of a Petition under the Companies Act or the Civil Procedure Act upon which the application was hinged on. That the proceedings herein were commenced by an Originating Notice of Motion under Section 7 of the Arbitration Act which strictly limits the Court's jurisdiction to granting interim measures of protection pending arbitration. Counsel submitted that upon recording a consent on 8th December, 2011 for the dispute to be dealt with by the High Court, there remained no substantive proceedings capable of being dealt with under the Companies Act. That the Court was invited to decide on complicated Company matters under a Miscellaneous application. That on the strength of **Kenindia Assurance Co. Ltd -vs- James Otiende [1989] 2 KAR 162.** this court lacked jurisdiction to entertain the matter.

12. On *res judicata*, Counsel submitted that Prayer Nos.4 to 10 of the Motion were similar to those contained in the Originating Notice of Motion dated 16/11/11, that the aforesaid Notice of Motion had been conclusively and finally determined by Rawal J (as she then was) vide the consent Order of 8/12/2011. That by dint of Section 7(5) those orders that were not expressly granted by the Court are deemed to have been refused. Counsel relied on the Case of **Ngugi -vs- Kinyanjui & 3 Others [1989] KLR 146.**

13. On sub-judice, Counsel submitted that if the Originating Notice of Motion did not determine Prayer Nos.4 – 10 in the Motion, then those Prayers are deemed to be pending. That the issues in the Motion are directly and substantially in issue in the said Originating Notice of Motion. That the Motion was caught up by the provisions of Section 6 of the Civil Procedure Act. That by commencing and prosecuting her claim by way of a Notice of Motion, the Defendants were prejudiced and cannot prosecute their counterclaim on division of shares, resulting trust and matrimonial property. In the Counsels view, the proceedings should have been commenced by way of petition.

14. On whether the applicant was entitled to the Orders sought, Counsel submitted that the facts stated in the Defendants' Replying Affidavit had not been denied and remained unchallenged. Counsel urged that the application be dismissed with costs.

15. I have considered the Affidavits on record, Counsel's written submissions and the authorities relied on. In my view, three (3) issues fall for determination, these are whether this Court's jurisdiction has been properly invoked and whether the application is *res-judicata*, the Originating Notice of Motion and the Mombasa **HCCC NO.3 of 2011 (O.S).**

The third issue is, whether the Applicant is entitled to the Orders sought.

16. I propose to deal with the issue of jurisdiction first. The Defendants' first challenge is that the Prayer to refer the matter to arbitration having been abandoned, there were no substantive proceedings on which the current motion can hinge on. To the Defendants, the consent Order of 8/12/11 had the effect of abandoning and therefore dissolving the proceedings as commenced. The applicant was of a contrary view.

17. It is not in dispute that these proceedings were commenced by way of an Originating Notice of Motion dated 16/11/2011. The jurisdiction of this Court was therefore invoked vide Section 7 of the

Arbitration Act of 1995. It is also not in dispute that the principal prayer in that Originating Motion was reference to arbitration and that all the other prayers in that pleading were only collorary to the said reference. I therefore agree with the Defendants that, save for an Order for reference to arbitration, all other orders sought under Section 7 of the Arbitration Act are interim and conservatory in nature.

18. This brings me to the consent recorded by the parties on 08/12/11 before Rawal J. That consent was in the following terms:-

“By consent of both the parties, this matter shall be heard by this Court. Parties have finalised the pleadings.

Parties are further directed to file submissions within 21 days hereof and the registry thereafter to give a hearing date for the Originating Notice of Motion on priority. By consent status quo maintained.” (Emphasis mine).

19. From the foregoing, it is clear that the parties agree that the forum for dispute resolution changed from an arbitral tribunal to this Court. Prayer number 3 of the Originating Notice of Motion became spent and what remained was Prayer Nos.4, 5, 6, 7, 8, 9 and 10 thereof. I believe that, what the parties agreed was to be heard on a date that was to be allocated by the registry. A dispute is informed by the remedy a party seeks. In the Originating Notice of Motion as commenced before this Court, the Applicant sought that her dispute with the Defendants be referred to arbitration but she agreed with the Defendants that the same be determined by this Court.

20. In terms of the Originating Notice of Motion, what was left was Orders that were to subsist ***“pending the hearing and determination of this Application and the arbitration.....”***. The application in this case was the Originating Notice of Motion. In essence, those prayers also became spent the moment the prayer for arbitration was abandoned since the same was grounded upon Section 7 of the Arbitration Act. In this regard, I am of the view and so hold that as at 13th January, 2012, when the Application dated 13th January, 2012, was being filed, the same was being filed on non-existent proceedings. The consent of 08/12/11 did not authorise the Applicant either to file any fresh proceedings, the parties agreed that they had finalised the pleadings, which was the Originating Notice of Motion and the Defendants' Replying Affidavit, and what they were to do was to file submissions and a date be allocated for the same. Accordingly, I agree with the Defendants that the Notice of Motion dated 13th January, 2012, was filed on a non-existent proceedings as there was nothing pending in Miscellaneous Civil Application No.487 of 2011. What the applicant should have done in my view was to commence proper and appropriate proceedings as provided under the Companies (High Court) Rules..

21. For the foregoing reasons, the Applicant is correct when she submitted at page 3 of her written submissions that:-

“It is imperative to however note that when the parties recorded the said Consent to have the matter determined by the Court rather than by Arbitration, the said Originating Notice of Motion became spent because the substantive Prayer sought therein, the Prayer for reference to Arbitration became fully determined. Accordingly, the agreement to file written submissions was recorded by mutual error since the Originating Notice of Motion was by then spent. To move the Court to now here and determine the substantive dispute as agreed vide the said Consent, we had to now file a fresh application to act as the statement of claim with the substantive prayers stated therein.” (underlying mine).

21. To my mind, that submission was partially correct as to the fate of the Originating Motion and way forward. The Applicant was supposed to move the Court on a separate proceeding under the Companies Act, either under Rules 5 or 8 of the Companies (High Court) Rules in which substantive prayers would be sought as she would have before the arbitral tribunal. This she did not do. She chose to bring those proceedings on an already spent proceeding. The Notice of Motion dated 13th January, 2012 in my view therefore cannot stand. The Court cannot exercise its jurisdiction on a non-existent proceeding.

22. Flowing from this, it is clear that the said motion cannot be either *res-judicata* or sub-judice the Originating Notice of Motion. This is because prayer Nos.4 to 10 of the Originating Motion were never considered. They dissolved or merged with the consent of 08/12/11. That consent was alive to the fact that the dispute between the parties had not been determined and was to be determined by this Court upon a proper proceeding. I do not therefore agree with the Defendants that by virtue of Section 7 (5), the prayers were declined. They were not because of the very manner in which they were prayed for, originally intended and by the very wording of the consent which presupposed that, prayer No.3 having been abandoned the parties urge the other prayers before this Court.

23. The Motion is also not sub-judice as the originating Notice of Motion was spent. It is non-existent. It is dead. It is not pending. Section 6 of the Civil Procedure Act is therefore not applicable.

24. Since I have held that the Court cannot exercise jurisdiction over a non-existent proceeding, I decline to determine the issue whether the Motion is sub-judice *Msa HCCC No.3 of 2011* or whether the Applicant is entitled to the orders sought. Those are issues that can be addressed if and when a competent proceeding is presented before a Company court.

25. For the foregoing reasons, I uphold the Defendants' objection and strike out the Applicant's Notice of Motion dated 13th January, 2012, with costs to the Defendants.

It is so ordered.

DATED and signed Signed at Bungoma this 14th day of February, 2014.

A. MABEYA

JUDGE

DATED and DELIVERED at Nairobi this ...4th day of ...March..... 2014.

J. B. HAVELOCK

JUDGE