



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HCCC NO.14 OF 2008**

**J M N.....PLAINTIFF**

**VERSUS**

**C W M.....DEFENDANT**

**RULING**

The Plaintiff's suit against the Defendant is for determination and division of matrimonial property. In his plaint, the Plaintiff averred that the parcels of land registered as LR. Nos.Ruiru/Murera East Block *[particulars withheld]* and House No.6 – 8 on LR. No. *[Particulars withheld]* were matrimonial properties and therefore the Plaintiff is entitled to a half a share of same. The Plaintiff further prayed that the court declares motor vehicle registration No. *[particulars withheld]* to be matrimonial property. Contemporaneous with filing suit, the Plaintiff filed an application for interlocutory injunction seeking to restrain the Respondent, her agent or servants from disposing of or alienating or adversely dealing with the aforesaid matrimonial properties pending the hearing and determination of the suit. The application is supported by grounds stated on the face of the application. The Plaintiff stated that the above properties were acquired during the subsistence of the marriage between the Plaintiff and the Defendant. He avers that he had substantially contributed towards the purchase of the same. It was the Plaintiff's case that although the suit properties were registered in the name of the Defendant, she was so registered to hold half a share in his trust. The Plaintiff was apprehensive that if the court did not intervene by issuing an order of injunction, it was likely that the Defendant would dispose of the suit properties without informing him. The application is supported by the annexed affidavit of the Respondent.

From the pleadings, it is apparent that the Defendant is a resident of the United States of America. It is not clear how the Defendant was served. There is no affidavit of service on record. However, on 10<sup>th</sup> September 2008, the Defendant appointed Messrs. J.K. Ngaruiya & Company Advocates to act on her behalf in this case. The said firm of advocates duly filed Notice of Appointment of an advocate. It also filed Notice of Preliminary Objection essentially challenging the service of the pleadings on the Defendant. The Defendant contends that the service of the application was made in contravention of the then **Order V Rule 23, 24, 25, 27 and 28** of the **Civil Procedure Rules**. The Defendant did not file any papers in opposition to the application.

During the hearing of the application, this court heard oral rival submission made by Mr. Wamotsa for the Plaintiff and by Mr. Kariuki for the Defendant. Mr. Wamotsa submitted that the Plaintiff was seeking to restrain the Defendant from adversely dealing with the suit properties pending the hearing and determination of the case that he had filed for division of matrimonial property. He explained that although the Plaintiff and the Defendant were married in Kenya, they relocated to the United States of America. The marriage fell apart and was dissolved by the Circuit Court for Prince George County, Maryland, United States of America on 26<sup>th</sup> June 2008. A copy of the decree absolute was annexed to the application. It was the Plaintiff's case that during the subsistence of the marriage, they acquired the suit properties through their joint effort. The properties were however registered in Defendant's names.

Following the dissolution of the marriage, the Plaintiff was apprehensive that the Defendant would dispose of the suit properties before the hearing and determination of the matrimonial property case. He urged the court to direct the Defendant to deposit the rental income from the above properties in a joint account pending the hearing and determination of the suit. In response to the application, Mr. Kariuki submitted that the suit was bad in law because the summons to enter appearance and the application were

not served in accordance with the provisions of the then **Order V Rule 27** of the **Civil Procedure Rules**. He submitted that in so far as the Defendant was not properly served as contemplated by the law, the suit herein was incompetent and could not be sustained. He urged the court to dismiss the application.

This court has carefully considered the rival facts of this case. This court will first dispose of the preliminary objection raised by the Defendant. This court understood the Defendant to say that she was not properly served as contemplated by the provisions of the then **Order V Rule 27** of the **Civil Procedure Rules**. The **Rule** provided an elaborate procedure to be followed when a Defendant is being served outside the jurisdiction of the Court. It is the Defendant's case that, being a resident of United States of America she was not properly served. This court has carefully considered the preliminary objection. As stated earlier in this Ruling, it is not clear how the Defendant was served. There is no affidavit of service on record. However, there is no doubt that the Defendant was served. She has appointed an advocate to act on her behalf in this case. Even if this court were to assume that the Defendant was not served as contemplated by the then **Order V Rule 27** of the **Civil Procedure Rules**, this court sees no prejudice that the Defendant suffered or will suffer by failure to be served as contemplated by the said **Rule**. She appointed an advocate to act on her behalf. Her interests are being taken care of by her duly appointed advocate. This court is of the view that the preliminary objection raised by the Defendant is a mere procedural technicality that cannot prevent this court from administering justice as required of it under **Article 159 (2)(d)** of the **Constitution**. The preliminary objection therefore lacks merit and is hereby dismissed.

As regards the merits of the application, the same was unopposed. The Defendant chose not to file any papers in opposition to the application. It was the Plaintiff's application that the suit properties should be preserved pending the hearing and determination of the division of the matrimonial property case. The Plaintiff explained that if the court did not grant the order of injunction sought, the Defendant may dispose of the suit properties thus defeating his case. Having evaluated the facts of this case, this court holds that the Plaintiff establish a *prima facie* case for this court to preserve the suit properties pending the hearing and determination of the case. The application is unopposed. The Defendant is restrained by means of an interlocutory injunction from selling, disposing of or adversely dealing with the three (3) suit properties mentioned above pending the hearing and determination of the suit. There shall be no orders as to costs.

**DATED AT NAIROBI THIS 2<sup>ND</sup> JULY, 2014.**

**L. KIMARU**

**JUDGE**