



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 644 OF 2012

RITA MARIA HURLIMANN.....PLAINTIFF/APPLICANT

VERSUS

RODGERS MWABONJE KADOSHI.....1ST DEFENDANT/RESPONDENT

ASHSARI APARTMENTS LIMITED.....2ND DEFENDANT /RESPONDENT

RULING

1. Pursuant to the provisions of Order 45 rule 1 of the Civil Procedure Rules 2010 and Section 1A, 1B and 3A of the Civil Procedure Act the Plaintiff has applied for an order of review and partial variation of the Orders made on 23rd July, 2012 by **Musinga J** staying the instant proceedings pending the hearing and determination of **Mombasa HCCC no. 3 of 2011 (O.S) Rodgers Mwaboje Kadoshu –v- Rita Maria Hurlimann.** The Applicant prayed that the Orders of Stay should be varied to only apply to issues that touch on the properties known as 7466/1/MN and 7467/1/MN and that the rest of the issues in these proceedings should be allowed to proceed to trial. The Applicant relied on the grounds on the body of the motion and her supporting affidavit sworn on 23rd August, 2012.

2. The Applicant contended that contrary to the allegations of the Defendants, these Proceedings do not pertain to matrimonial properties owned by herself and the 1st Respondent as a married couple, but that the same relate to the unlawful exclusion of the Plaintiff from the management and participation in the 2nd Respondent Company wherein she is a shareholder. That further **Mombasa HCCC No. 3 of 2011 (O.S)** is a suit that concerns the division and distribution of the matrimonial properties and was filed by the 1st Respondent under the Matrimonial Properties Act 1882. The Applicant contended that issues touching on the management, running and dealing in the shares of the 2nd Defendant Company cannot therefore be subject to the suit in Mombasa as the 2nd Company is a separate and distinct entity from its members and their matrimonial property. She therefore contended that the issues of her shares in the 2nd Defendant Company should not be stayed under Section 6 of the Civil Procedure Act as the matters are separate and distinct from matters of division of matrimonial property. She also conceded that since she had sought orders on the properties known as 7467/1/MN and 7466/1/MN in the instant suit and the Orders of stay of proceedings made by this court should thus be varied to only apply to the issues that touch on the aforementioned properties.

3. It was her further contention that the **Mombasa HCCC No. 3 of 2011 (O.S)** is a non-starter and not maintainable under law as it was filed under the Married Women's Property Act 1882 and that as the name suggests, it is a statute that should be invoked by married women and not by a man/ husband. That the 1st Defendant not being a woman cannot therefore rely on the aforesaid statute to seek a share of the matrimonial property from the Applicant. The Applicant further averred that she was yet to be served with the pleadings to the **Mombasa HCCC No. 3 of 2011 (O.S)** and as such the case should not be used to block the present proceedings. The Applicant also urged the court to consider the spirit of the consent of the parties recorded on 8th December, 2011 before Honourable Justice K. Rawal wherein the parties resolved to have the matters expeditiously heard by the Court sitting in Nairobi as opposed to arbitration. That in light of the 2nd Defendant's failure to serve the Plaintiff with the pleadings in **Mombasa HCCC No. 3 of 2011 (O.S)** and the delayed commencement of the said suit, the orders for stay issued herein serve to further delay the matter which goes against the spirit of the said consent.

4. In opposition, the 1st Respondent filed a Replying Affidavit sworn on 12th October, 2012. He contended that the division of all matrimonial properties between the Applicant and himself is a subject of **Mombasa HCCC No. 3 of 2011 (O.S)** which is still pending. It is contended that service of the pleadings of the aforesaid suit to the Applicant has been a challenge since the Applicant relocated to Zurich, Switzerland. The 2nd Defendant also averred that there was a pending **Divorce Cause No. 73 of 2009** between himself and the Applicant. He also contended that there had been on-going negotiations between the parties together with their respective lawyers with regard to settlement of the pending cases touching on matrimonial properties and this included the instant case. The 1st Defendant also contended that **Mombasa HCCC No. 3 of 2011 (O.S)** has a bearing on this case as it seeks specific orders with regard to the properties known as 7466/I/MN and 7467/I/MN. That further to that, the notion advanced by the Plaintiff that a man cannot invoke section 17 of the Married Women's properties Act of 1882 is erroneous as he contended that the statute allows either the wife or husband to invoke Section 17 of the aforesaid Act. The 1st Defendant was also of the opinion that the Applicant is undeserving of the Orders sought as she has failed to attain the threshold for an order of review under the law. He contended that the Applicant had not shown that there is sufficient reason, error or mistake apparent on the face the record or new matters to warrant a review of the Orders of Stay of proceedings granted by this Court. He further contended that the issue of facts raised in the instant application are similar to those raised by the Applicant in support of her Notice of Motion filed on 13th January 2012, that should the orders of review be granted as requested by the Applicant, this would result in a multiplicity of cases considering that **Mombasa HCCC No. 3 of 2011 (O.S)** was filed prior to the instant suit.

5. I have carefully considered the application, affidavits on record and the written submissions by counsel. The law on review of Judgements or court orders is well settled.

Under Order 45 (1) of the Civil Procedure Rules an applicant must show that there is an error or mistake apparent on the face of the record or that there is new evidence that is material to the matter that was not available to the Applicant at the time the orders were issued or the decree was passed or for any sufficient reason. Does the Applicant meet the threshold mandated by the Order 45 of the Civil Procedure Rules? The Applicant submitted that she brought this application under Order 45 Rule 1 under the limb of sufficient reason that would warrant a variation of the Orders made on 23rd July, 2012 by Musinga J.

6. The first issue raised is that the instant proceedings and those of **Mombasa HCCC No. 3 of 2011 (O.S)** are of a different character. The Applicant contended that the latter suit was instituted by the 1st Defendant under the Married Women's Property Act 1882 and has sought orders on the sharing out and distribution of matrimonial property. That the instant suit, however, has to do with management and participation of the Applicant in the running of the 2nd Defendant Company. I have looked at the Pleadings of both suits. From a plain reading of the Originating Summons dated 3rd October, 2012 in **Mombasa HCCC No. 3 of 2011 (O.S)**, it is manifestly clear that in that suit, the Defendant wants the court to resolve the issues touching on the immovable properties acquired by himself and the Applicant during the tenure of their marriage. There is particular mention of the matrimonial properties known as plot numbers 7466/I/MN and 7467/I/MN commonly known as "**Ashari Apartments**" in respect of which

the 1st Defendant seeks a number of prayers including that the same do constitute his 50% share of the matrimonial property in question.

7. With regard to the present suit, the dispute is in respect of the management of the 2nd Defendant Company in which both the Applicant and the 1st Defendant are the sole shareholders. The Applicant has sought a number of orders mainly to do with the management and control of the 2nd Defendant Company. However, she has sought an Order in prayer No. 4 of the Originating Summons dated 16th November, 2011 in the nature of an injunction to restrain the Defendant and/or his agents from dealing, selling or transferring of the properties known as 7466/I/MN and 7467/I/MN. In my opinion, this prayer will have a bearing on **Mombasa HCCC no. 3 of 2011 (O.S)** as that Court has also been tasked with determining issues surrounding the aforesaid properties. It would seem that this was the main reason why the Order stay of proceedings was given by Musinga J under Section 6 of the Civil Procedure Act 2010.

8. However, a critical look at both suits will reveal that they are markedly different. The present suit deals with the subject properties only in Prayer No. 4 of the Originating Summons whilst the rest of the 10 prayers relate to the parties ownership of the 2nd Defendant Company. **Mombasa HCCC No. 3 of 2011 (O.S)** has to do with division of matrimonial property. In that suit, there are no issues that touch on the 2nd Defendant where the Applicant and the 1st Defendant are the sole shareholders. Whilst the cause of action that suit is under the Married Women Properties Act of 1882, the cause of action in the present suit basically lies in Company Law under the Companies Act Cap 486 Laws of Kenya.

9. I agree that the Company is a separate and distinct entity from its shareholders. As related the Company, the Applicant and 1st Defendant as considered as shareholders, rather than husband and wife. Their matrimonial battles should therefore have no bearing whatsoever on issues to do with the management of the 2nd Defendant. The Applicant relied on the case of **Lilian Njeri Mungai –v-Dr. Njoroge Mungai , Civil Appeal No. 191 of 1995** in buttressing her point. In the said case, the Court of Appeal held that where issues touching on the management, running of and dealings in the shares of a Company in which the shareholders were a married couple, the same cannot be subject of a matrimonial cause brought under the Married Women’s Property Act 1882 for the division of the matrimonial property as the company is a separate and distinct entity from its members. As such, it follows that shares held in a Company are separate and distinct from matrimonial property.

10. In a swift rejoinder, the learned counsel for the 1st Defendant submitted that the Court of Appeal in the case of **MUTHEMBWA –vs-MUTHEMBWA 1 KLR at 247** the court held that it had Jurisdiction under Section 17 of the Married Women’s Property Act 1882 to deal with shares of a company which one or both spouses are shareholders. To my mind, the decision of the Court of Appeal in that case was informed by the particular set of facts of the case before it. The issue of shares in the company was an issue in that case. The Court was dealing with a situation in which matrimonial property was intertwined with company property. Indeed the Court held that:-

“...in certain cases particularly in companies, in which only one spouse is the shareholder or where properties of the company have been mixed with matrimonial property, problems do arise. In such a case more particular where the said property....cannot be split without dealing with respective shareholding of the parties , a court may, in an application under section 17, above deal with parties respective interest in the company. Section 17, does allow it.” (Emphasis supplied)

11. In the **Mombasa HCCC. No. 3 of 2011 (O.S)** case, there is no claim that the property of the company is mixed with the matrimonial property of the Applicant and 1st Defendant. Indeed, from the court record, there was indication that the Company does not own any property. The Court shall therefore not be called upon to deliberate on the issues that bedevil the 2nd Defendant, as it is not even party to that suit. As stated earlier, the rights of the Applicant as a shareholder of the 2nd Defendant Company cannot be determined in and are not the subject of **Mombasa HCCC. No. 3 of 2011 (O.S)**. The same can only be ventilated in the present suit. It would therefore be unjust to the Applicant for this court to stay the entire

proceedings on matters that are not part and parcel of **Mombasa HCCC. No. 3 of 2011 (O.S).**

12. I am also of the view that the 1st Defendant has failed to demonstrate how the continuation of the instant suit on matters concerning the 2nd Defendant Company will affect **Mombasa HCCC. No. 3 of 2011 (O.S).** Though the Applicant contends that the aforementioned suit is a nullity by virtue of the fact that it has been brought by a man instead of a woman under the Married Women's Property Act 1882, it is my view that this argument should be canvassed before the Court that shall be dealing with the **Mombasa HCCC. No. 3 of 2011 (O.S).**

13. Having come to the conclusion that the issue of plot Nos.7467 and 7466/I/MN is severable from the issue of the management of the 2nd Defendant company, is it just to hold the prosecution of the entire suit in abeyance in light of Sections 1A and 1B of the Civil Procedure Act? By staying all issues in the present suit, will it be determining the dispute in an expeditious and proportionate manner? I think not. I am also alive to the fact that the Mombasa case, though filed in 2009, has not even commenced. A court must treat the parties before it equally considering all the circumstances of each case.

14. In the foregoing, I find that the Applicant has demonstrated sufficient reason for this Court to vary the Orders of Stay of Proceedings given by Musinga J on 23rd July, 2012 to confine the same only to the issue that pertain to the matrimonial properties that are in issue in Mombasa HCCC. No.3 of 2011 (O.S), namely plot number 7467/I/MN and 7466/I/MN. The rest of the issues in the Applicant's Originating Summons dated 23rd November, 2011 can therefore proceed to trial.

15. Accordingly, I allow the Notice of Motion dated 23rd August, 2012 as prayed.

DATED and **DELIVERED** at Nairobi this **12th** day of **April**, 2013

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A. MABEYA

JUDGE