

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 52 of 2011

JULIANA MUTHINI VELESEAPPLICANT

VERSUS

PHILIP VELESE MWENDWA.....RESPONDENT

RULING

The Motion dated 21st September 2011 seeks interlocutory orders for the preservation of the property the subject of the suit herein.

The Originating Summons dated 21st September 2011 relates to division of matrimonial property. The applicant has in her papers listed properties that she says were acquired doing coverture. It is these properties that she would like to be preserved pending the hearing and disposal of the suit as she fears that the respondent may alienate or dispose of them before the suit is heard and determined.

The applicant's supporting affidavit to the Motion has listed several properties in paragraphs 3,4,18 and 21. In his reply to the application, the respondent has agreed that he had acquired some of the assets that before the marriage was contracted. On wedding of gifts, he acknowledges them save for the cattle which he says was never delivered and that he never made a follow up on it. He denies that the applicant contributed to the acquisition of the rest of the property. On items that the applicants considers to be her personal property, the respondent offers that she is free to collect the same from his rural home.

At the hearing of the Motion counsel for both sides urged their clients cases. Mr. Odawa for the applicant assessed that the applicant was entitled to a share in the property the subject of the suit by virtue of contribution. Mr. Kitheka for the respondent attacked the application on the basis that the material placed before the court was insufficient for the purpose of helping the court grant injunctive orders.

I have carefully gone through the papers filed in this matter. I have also considered the arguments made by counsel. I have also considered the arguments by the parties. I note that no documentary proof has been provided by the applicant in respect of the property she claims. Documentary proof is essential to bring the acquisition of the property within the framework of **Section 17** of the Married Women's Property Act, 1882. I am mindful of the fact that I am not dealing with the main suit, but an interlocutory application. The applicant ought to convince me that the application meets the criteria set in **Giella -vs- Cassman Brown** for grant of injunctions. It had to be demonstrated that there is a prima facie with probability of success.

I note that most of the assets relate to household goods. With respect to this, the respondent says that the applicant is at liberty to collect what belongs to him from the respondents rural house. I note that some of the household items have been in use with the time of the wedding. There is wear and tear. Some might have broken down, some got lost or destroyed and some discorded. There is no evidence that these items are in existence. The court ideally ought only to issue orders in respect of what actually exists as what does not exist cannot be preserved.

On the acquisition of the business, Shelta Dreams Hardware and General Supplies, there is nothing to connect the applicant to it. It is not even clear what was acquired – whether it was the land and building or the stock. The landed property in Mwingi is also not defined – in terms of land reference numbers or where is the property is situated should it not be demarcated. There is reference to Tassia NSSF, Block

224/2011. No document has been attached to the affidavit of the applicant to connect the respondent to it. The respondent denies having any connection with it. A search certificate could have sufficed. On the whole I find that only one (1) asset is clearly defined – motor vehicle KBG 964L.

It is not enough for a party to show or plead that there is a pending originating summons under Section 17 of the Married Women's Property Act in order to obtain injunctive orders. To get injunctive orders, it must be demonstrated that the assets exist and that there is danger that they are likely to be wasted before the suit is determined. As I have said above only one asset has been positively defined, not by the applicant but by the respondent, and that is the motor vehicle. I will grant the injunctive orders but only in respect of the motor vehicle, KBG 964L.

The respondent has indicated that there are items at his rural home which he concedes belong to the applicant and states that the applicant is at liberty to collect. I will direct that the parties herein shall arrange for a hand over of the said items to the applicant. Thereafter the matter shall be mentioned after thirty (30) days to confirm compliance.

DATED, SIGNED and DELIVERED at NAIROBI this 2ND DAY OF May, 2013.

W. M. MUSYOKA

JUDGE