



REPUBLIC OF KENYA

High Court at Kericho

Civil Suit 20 of 2012

RAELI CHEPNGETICH CHEBELYON.....PLAINTIFF

VERSUS

ELIJAH CHERUIYOT CHEBELYON.....RESPONDENT

RULING

By a Chamber Summons dated 12th March 2012, the Applicant **RAELI CHEPNGETICH CHEBELYON** seeks orders as follows:

- **THAT** the Respondent/ and/ or his servants or agents be restrained from evicting the Applicant from the matrimonial home constructed on title Number Kericho/Kipchimchim/ 474 and from threatening, harassing or in way interfering with Applicant's peaceful occupation and quiet enjoyment of the matrimonial home in Kericho pending interpartes hearing of this Application and hearing and determination of the Originating Summons.
- **THAT** the Respondent either acting through himself or his agents be restrained from transferring, selling, disposing, damaging, wasting, alienating, encumbering or in any other way interfering with the suit properties (the "suit properties") listed herein below pending interpartes hearing of this Application and hearing and determination of the Originating Summons.

- a) Title Number: Kericho/Kipchimchim/2342;
- b) Title Number: Kericho/Kipchimchim/474;
- c) Title Number: Kericho/Kipchimchim/1511;
- d) Title Number: Kericho/Kipchimchim/466;
- e) Title Number: Kericho/Kipchimchim/2961;
- f) Title Number: Kericho/Kipchimchim/3114;
- g) Title Number: Kericho/Kipchimchim/477;
- h) Title Number: Kericho/Kipkelion/Kipchorian/Lelu block 8 (Songonyet)/166;
- i) ½ share in Land Reference No. 11336 (Original Number 5635/2);

- j) Land Reference No. 3734/26 (Original Number 3734/3/21);
 - k) Land Reference No. 631/340
 - l) Title Number: Nakuru/Olenguruone/Chepakundi/162;
 - m) Land Reference No. 631/3/IV
 - n) Motor Vehicle registration Number KBG 292K;
 - o) Motor Vehicle registration Number KAP 970K;
 - p) Motor Vehicle registration Number KAL 256C; and
 - q) Motor Vehicle registration Number KBQ 178J;
- **THAT** the Respondent be ordered to pay a sum of Kshs. 100,000/= per month to the Applicant for her maintenance and upkeep pending the interpartes hearing and determination of the Application.
 - **THAT** the rental income, tea and milk sales from the suit properties be deposited in a joint account between the Applicant and the Respondent and/or their representatives and with the powers of the two parties and/or their representatives to make necessary withdrawals pending the hearing and determination of this suit.
 - **THAT** the Respondent be ordered forthwith to release to the Applicant for her use one of the motor vehicles being Motor vehicle Registration number KBG 292K pending the hearing and determination of the suit.

The application is based on grounds as per the body therein. Basically that parties herein contributed to acquisition of the said properties. Their investment included farming and rental income. Proceeds were deposited in account number 1103445308 held at Kenya Commercial Bank. Other than the threat to evict her from their matrimonial home, the Respondent had deterred her from using any of the motor vehicles acquired during the subsistence of their marriage despite her advanced age. The application is supported by an affidavit sworn by the applicant.

In a response thereto the Respondent filed a notice of Preliminary Objection on the grounds that the application was *res judicata* or could be *sub judice*; the application is scandalous, frivolous, bad in law, vexatious and an abuse of the process of the court.

Also filed is a replying affidavit. The Respondent denied the allegations set out in the affidavit sworn by the applicant.

I have considered rival submission of both counsels for the Applicant and Respondent and all authorities relied on.

The first issue that should be determined is whether the application is *res judicata*.

Section 7 of the **Civil Procedure Act** Stipulate as follows:

“7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

The Black’s Law Dictionary defines it as:

“a thing adjudicated. An issue that has been definitely settled by judicial decision...”

It goes on to state the three (3) elements that are essential:-

1. An earlier decision on the issue.
2. A final Judgment on the merits
3. The involvement of the same parties.

Parties herein have a Divorce Cause no.[PARTICULARS WITHHELD] whereby the Applicant herein has petitioned for divorce. An interlocutory application was filed in the matter. Under **Rule 3(3)** of the **Matrimonial Causes Rules** whereby the applicant sought orders of maintenance, the Respondent to be restrained from transferring or in any way interfering with properties mentioned in this application; from threatening, harassing or interfering with her peaceful occupation of the Matrimonial properties in Kericho among other prayers.

The court considered the application and dismissed it on technicalities. The court found that the petitioner having wrongly included the issue of the suit properties in the petition instead of moving the court by way of Originating Summons the application could not stand hence due to that she had failed to establish a prima facie case with a probability of success that would qualify her to obtain orders sought.

This was indeed an adjudication of the matter before it. It was a decision of a court and since the sum up was that the applicant had failed to satisfy the court as to why orders sought had to be granted. It was a determination of the issue before the court at that stage.

The question I would seek to address is whether this was a final decision on merits. To answer the question I would seek to establish if the relief sought in this application was substantially in issue in the previous application. There was a prayer for restraining the Respondent from transferring /interfering with the titles to the suit property. This is prayer 3 in the present application.

There was a prayer for maintenance. In prayer 4 of the application the applicant prayed for maintenance/upkeep, a sum of Kshs. 100,000 per month pending hearing of the application. The application having been heard the same must be discharged. To this extent these issues are **res judicata**.

Some relief sought was however not substantially in issue namely prayer 2, 5, and 6 in the present application. A final determination having not been on the issue on merit they cannot be dismissed as being **res judicata**.

Is the application **sub judice**? In the Preliminary Objection it was stated that the application may be **sub judice**. Counsel did not dwell on this particular issue but he asked this court to refer to case of **Abdul Kassim Hassanali Gulam Hussein Khala –Vs- Southern Credit Banking Co-oration Ltd (2006) eKLR** where issues of **res judicata** and **sub judice** were considered. In that case there was an appeal pending hence the court found that the doctrine of **sub judice** was applicable.

Subjudice is defined as an issue before the court for determination. I have aforesaid that in the application some issues are not pending before any court for determination. In the circumstances it cannot be said to be **sub judice**.

It is submitted by Counsel for the Respondent that issues of Married Women’s’ Property fall under the domain of the Environment and Land Court. He alluded to Section 13 (1) (2) paragraph (e) of the Environment and Land Court Act, 2011 and Article 162 (2) (b) of the constitution.

Article 162 (2) (b) of the **Constitution** stipulate as follows:

“(2) Parliament shall establish courts with the status of the High Court to hear and determine

disputes relating to—

(b) the environment and the use and occupation of, and title to, land.”

Section 13 (1) (2) (e) of the **Environmental and Land Court Act, 2011** stipulates as follows:

“(2) In exercise of its Jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes relating to environment and land, including disputes-

(e) any other dispute relating to environment and land.”

The Constitution creates a court of a High Court status established by parliament to hear land matters, the use, occupation and land. The Statute created by parliament which is the Environment and Land Court Act gives jurisdiction to the court to determine disputes in respect of land.

The Act repealed the Land Disputes Tribunal Act No. 18 of 1990. It does not repeal Section 17 of the Married Women Property Act.

The application herein concerns sharing of properties among married people. It cannot be envisaged to be a matter touching on title to land.

I therefore have to consider the issue whether the application herein is frivolous, scandalous, vexatious and an abuse of the due process of the court. In reinforcing his argument, Counsel for the Respondent called upon the court to strike out the Supporting affidavit to the application for failure to disclose sources of information averred in paragraph 22.

He cited the case of **Muimara Properties Limited Versus Indika Amakobe & 6 Others (2006) eKLR** where an affidavit was struck out for not conforming with requirements of **Order XVIII Rule 3 (a) of the Civil Procedure Rules**.

Paragraph 22 of the affidavit states as follows:-

“In addition to what the Respondent has informed me, I have reliably learnt from relatives and close family friends....”

The names of relatives and friends are not disclosed but the Respondent is indicated as one of the source of information. The affidavit contains 29 paragraphs. Striking out the whole affidavit just because the names of the relatives and friends is not disclosed will be draconian.

In any case pursuant to **Article 159 (2) (d) of the Constitution**, justice must be administered without regard to technicalities. This is a technicality that cannot make this court strike out the affidavit. In paragraph 27 of the affidavit the applicant expresses her apprehension of what may befall matrimonial properties. There is nothing scandalous about it.

Having determined issues raised in the Preliminary Objection I must now address the application in respect of prayer 2, 5 and 6 that I aforesaid not be **res judicata**. To get reliefs sought following the principle in **Giella Vs. Cassman Brown, 1973 E.A 358**. The applicant must show a prima facie case with a possibility of success, and secondly that she will suffer irreparable injury which would not be adequately compensated by an award of convenience. Thirdly, if the court is in doubt as to the two (2) above it would decide the application on a balance of convenience.

In her affidavit the applicant, in paragraph 13 states that the Respondent had forcefully evicted her from the matrimonial home, threatened her with death or unspecified consequences. According to paragraph 15 she only returned to their matrimonial home following a court order.

In the Replying affidavit, paragraph 6 the Respondent denied having evicted the applicant from the

matrimonial home.

Annexure "RCC 66" to the supporting affidavit of the applicant is an order issued by the court dated 10th June 2010 in Divorce Cause no. [.....] whereby both parties entered into a consent restoring the Petitioner (Applicant) to the matrimonial home pending hearing of the application.

This *per se* was evidence that the applicant had been evicted from the matrimonial home. The applicant has therefore established a prima facie case that there could be a possibility of being harassed and evicted from the suit premises unless the court intervenes.

Regarding prayer 5 where the applicant seeks an order to have income accruing from the suit properties deposited in a joint account. This is an issue that will adjudicated upon in the substantive application. Evidence must be adduced as to whether money is usually deposited in the account or not.

Regarding prayer 6 the Respondent denied having deterred the Plaintiff from use of Motor vehicles. Since the averment is not controverted then she should be allowed use of Motor vehicle registration number KBG 292K

The applicant having demonstrated why interlocutory orders should issue in respect of some prayers in the application it is ordered as follows:

- 1) The Respondent be and is hereby restrained from evicting the Applicant from their Matrimonial home situated at Kericho/Kipchimchim/474; threatening/ harassing and interfering with her peaceful enjoyment of the home and what appertains to the home pending hearing and determination of the Originating Summons.
- 2) The Respondent do release motor vehicle registration number KBG 292K to the applicant for use pending hearing and determination of the suit.

Costs of the application shall be on the cause.

DATED at KERICHO this 7th day of November 2012

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LILIAN N. MUTENDE

JUDGE

COUNSEL APPEARING

Mr. Kamotho for the Applicant- present

Mr. Siele Sigira for the Respondent- present

Mr. R. Koech, Court clerk