



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 450 OF 2009

IN THE MATTER OF THE SALE OF A MORTGAGED PROPERTY L.R. NO. [particulars withheld]

AND

IN THE MATTER OF THE SHARING OF THE PROCEEDS OF THE SALE OF L.R. NO. [particulars withheld] ALSO KNOWN AS [particulars withheld]

BETWEEN

J WG.....PLAINTIFF/RESPONDENT

VERSUS

M W G.....DEFENDANT/APPLICANT

RULING

Coming up for determination is the Defendant's application brought under **Section 1A, 1B, and 3A of the Civil Procedure Rules** dated **10th May 2013** seeking orders that pending the hearing and determination of the suit, the Court does order the release of the uncontested amount of his pension held by **M/s Walker Kontos Advocates** being **Kshs. 3,750,000/-**.

The application is premised on grounds outlined thereunder and supported by an affidavit sworn by the Defendant, as follows;the Plaintiff lays claim over **50%** of the Defendant's pension monies held by **M/s Walker Kontos Advocates**. On **9th September 2009**, the Court issued an order restraining the said law firm from releasing any monies to the Defendant. It is the Defendant's disposition that he has since exhausted the amounts of money available to him in meeting his basic needs and catering for his responsibilities, including education for the children. Consequently, he has been unable to meet his obligations in regards to maintenance and education, with the outstanding school fees growing to **Kshs. 102,380/-** as at the date of filing the application. Besides, the Children's education, the Defendant deposes that he is ailing thus requiring frequent hospital visits and medication.

The Defendant deposes that he is willing to give an undertaking to secure the **50%** of the pension claimed and/or contested so as to be paid to the Plaintiff in the event the Court finds in her favour. Moreover, that the Plaintiff stays in one of his properties which is sufficient security to serve the outcome of the suit. The Defendant contends that the prayer sought for the release of the uncontested **50%** of the amount held by **M/s Walker Kontos Advocates** is not prejudicial to the Plaintiff. Further, that it would be in the interest

of justice that the orders sought is granted for the interests and welfare of the children.

In support of his application, the Defendant annexed copies of statements showing fees arrears owed to the school with an accompanying notice that the child will not be accepted back before clearing the arrears.

The application was opposed by the Plaintiff who swore a Replying Affidavit on **13th June 2013** wherein she deposed that contrary to the averments in the application, all monies held by **M/s Walker Kontos Advocates** are contested. The Plaintiff refuted the Defendant's claims deposing that the application was intended to deny her a fair trial wherein the outcome of the decision on the proceeds of the subject matter will be properly and fully determined. The Plaintiff referred to the demand notes annexed to the Defendant's affidavit and deposed that there were no fees arrears on account of the children's education. It was her deposition that first; she had no knowledge of the existence of fees arrears as she had not been served of such demands by the school and secondly, that their children are enrolled at **[particulars withheld]** and not **[particulars withheld]** which is owed **Kshs. 20,300/-** only according to the Defendant's annexures and, therefore, that the application was premised entirely on false and inexistent grounds.

The Plaintiff denied that she was claiming the Defendant's pension, stating that his pension was not related to the case at all. Conversely, that she lays a claim of **50%** of the proceeds from the sale of the house. She also refuted the Defendant's claim that he is solely responsible for the upkeep of their children, and deposed that **75%** of the children's expenses is shouldered by her. The Plaintiff also deposed that she was aware that the Defendant had already sold half of the property that she is in occupation and taken a loan with **Equity Bank Ltd** on the other half. Consequently, that her security and that of their children is not guaranteed in the face of the Defendant's motion should it be granted.

Written submissions were filed by both parties which I have carefully considered. It is the Defendant's contention that the Plaintiff lays claim to **50%** of the proceeds of the sale of the Kitisuru House, the subject matter herein. Thus, the remainder **50%** should be released to him on the basis that the same is uncontested. The Defendant submits that the funds will enable him meet his basic and obligatory needs which include school fees and upkeep for his children. The Plaintiff on her part submits that her **50%** claim of the proceeds will be rendered nugatory if the instant application is allowed. It is her submission that she suspects there could be some undisclosed sums paid out to the Defendant without her knowledge which can only be ascertained at the hearing and consequently affect the split of the proceeds. The Plaintiff further submit that the children's welfare has been used as an excuse and that the application has been made in bad faith as the Defendant has a running business and therefore not short of money as alleged.

I have carefully perused the Court file and taken note that on two occasions, this Court (Ougo J.) did order the parties to set the matter for hearing wherein the issues in dispute and reliefs sought shall be dealt with. As captured in the summary above, the grounds relied on by the Defendant in his application have highly been contested. To order any amount of money to be released to the Defendant, without the benefit of a full trial, would be, in my view, prejudicial to the Plaintiff.

Consequently, I decline to exercise my discretion as sought by the Defendant herein and do order that the matter proceeds to hearing expeditiously Parties are hereby directed to comply with **Order 11 of the Civil Procedure Rules** within **30 days** of the date hereof, and a hearing date be taken in the registry on priority basis.

Dated, Signed and Delivered this **29th** day of **April, 2016**

L. GACHERU

JUDGE

In the Presence of:-

None attendance for the Plaintiff/Respondent (though notified)

C N Kihara for the Defendant/Applicant

Hilda : Court Clerk

L. GACHERU

JUDGE

29/4/2016

Court:

Ruling read in open Court in the presence of Mr C.N Kihara for the Defendant/Applicant and absence of Mr Harrison Kinyanjui for the Plaintiff/Respondent though notified.

The Defendants Advocate to serve a Notice of delivery of Ruling to the Plaintiffs Advocate and the directions given on expeditious compliance of Order II of Civil Procedure Rules.

L. GACHERU

JUDGE

29/4/2016