



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPLICATION NO. NAI 292 OF 2013

BETWEEN

S M M alias G S K alias S S M APPLICANT

AND

C A. K. M alias C A K M RESPONDENT

(An application for injunction under Rule 5(2)(b) of the Court of Appeal Rules, 2010 pending the filing hearing and determination of and intended Appeal from the judgment of the High Court (Asike Makhandia, J) dated 20th September, 2013 dismissing the Applicant's suit

in

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 58 OF 2009)

RULING OF THE COURT

1. The applicant seeks orders under Rule 5(2)(b) of the Rules of this Court to restrain the respondent from blocking the applicant's access to plots *[particulars withheld]* and *[particulars withheld]* in Katelembo Athiani Mavuti Farmers and Ranching Cooperative Society Limited on which she claims their matrimonial home is situate or from disposing, transferring or dealing with the same. She also seeks to restrain the respondent from disposing, transferring charging or dealing with plot number *[particulars withheld]* also situate in Katelembo Athiani Mavuti Farmers and Ranching Cooperative Society Limited as well as an order to stay execution of the decree arising from the judgment of the High Court delivered on 9th October 2013 from which she intends to appeal to this Court pending the hearing and determination of the intended appeal.

Background

2. The applicant's relationship with the respondent goes back to 1986 when she says she was employed by the respondent as a teacher in his dressmaking training school in Machakos Town. A few years later her relationship with the respondent blossomed into a romance. In 1990, the respondent, who was already married to one D N K (N), proposed marriage to the applicant.

Believing that the respondent's marriage to N was under Kamba Customary Law and therefore potentially polygamous, the applicant accepted the respondent's proposal to become a second wife.

3. According to the applicant, her union with the respondent after her marriage to him had a Midas effect; the duo became a formidable business success story; they engaged in business jointly; the profits derived from the businesses they undertook together were used to acquire assets whose value according to the applicant is in excess of Kshs. 100 million. Those assets included plots **[particulars withheld]** and **[particulars withheld]** in Katelembo Athiani Mavuti Farmers and Ranching Cooperative Society Limited on which she claims their "matrimonial home" is situated and plot number **[particulars withheld]** also situated in Katelembo Athiani Mavuti Farmers and Ranching Cooperative Society Limited.
4. All appears to have been well between the parties until 20th November 2008 when according to the applicant the respondent locked her out of the businesses, invaded her home and broke padlocks to the main house, shifted her personal effects to the guest house and installed new padlocks thereby evicting and depriving the applicant access to the house and farm despite what she referred to as "her lawfully vested interests and rights".
5. The applicant commenced suit against the respondent in the High Court at Machakos in March 2009 and sought judgment against the respondent for; permanent injunction orders restraining the respondent from entering and evicting her from her home whether on plot Nos **[particulars withheld]** or any other plot in Katelembo Athiani Muvuti Farmers and Ranching Co-operative Society Ltd; a permanent injunction restraining the respondent from alienating disposing of or dealing, in any manner whatsoever prejudicial to her rights and interests, with all the properties acquired, whether in the names of the applicant, the respondent or of **[particulars withheld]** Co. Ltd, with proceeds of the businesses that have been operated jointly by the applicant and the respondent from 1990 to 2008; a declaration that the appellant and respondent have been and are in joint partnership in the said businesses that they have conducted together in the period between 1990 and 2008; accounts of all the income of the said businesses and of all the properties acquired with the proceeds of the said businesses in the said period; and an order that the respondent do give the applicant an equal share of all the income and properties of the said businesses and that the respondent do return to the applicant all the clothing, personal effects and other properties which he has seized from her. The applicant also sought general damages for her services as a wife.
6. In his defence, the respondent denied having ever employed or married the applicant and asserted that the applicant was married to one B M; contended that any relationship with the applicant was adulterous, secret and wrong; denied having entered into any joint ventures or businesses with the applicant; contended that the "Katelembo House is the...[respondent's] farm house which was developed in the year 1994 when the [applicant] was an employee..." and that the applicant was "only living there as a licensee(sic)" and had since become a "trespasser to the home of the [respondent]." The respondent therefore prayed that the applicant's suit be dismissed.
7. After hearing the parties, the High Court took the view that the applicant's suit "*as concocted is so murky that the court is left bewildered as to the remedies available to the plaintiff*" and held that having been married under statute to N, the respondent did not have legal capacity to contract a marriage with the applicant and marriage could not therefore be presumed between the parties; that the question of division of matrimonial property could not in the circumstances arise as no marriage subsisted between the parties; that the applicant "*seems to be gambling and on a mission to unjustly enrich herself*"; that the applicant is not entitled to a share of the respondent's properties and that on the facts the existence of a business partnership between the parties could not be inferred under the Partnership Act. The judge did not therefore find any merit in the applicant's suit and he dismissed it.
8. Aggrieved by that decision the applicant lodged a Notice of Appeal on 17th October 2013 and on

30th October 2013 filed the present application in this Court complaining that immediately after the delivery of the High Court judgment on 9th October 2013 the respondent evicted her together with their “*three and a half old child from [the] matrimonial home*” with the result that she has become destitute, has been rendered homeless and is leaving on alms.

Submissions by counsel

9. At the hearing of the application before us the parties were represented by learned counsel. Mr. Benjamin Musau together with Mr. Mark Ndungu appeared for the applicant. Ms. Gladys Gichuki appeared for the respondent.
10. In support of the application Mr. Musau submitted that the intended appeal is arguable in that in rejecting that there was a marriage by presumption between the parties, the learned trial judge ignored evidence of marriage including affidavit evidence in which the respondent deposed that he was married to the applicant under customary law as well as the fact that both parties are shareholders in **[particulars withheld]** Co Ltd; that the judge failed to consider that the respondent did not show that he had any interest in plot **[particulars withheld]**; that there is evidence consisting of a valuation report that shows the “matrimonial home” is constructed on two plots one of which is owned by the applicant and there can be no doubt the applicant has an interest in the property and owns the same equally whether as a wife or as a business partner and she cannot be without a remedy; that since the delivery of the impugned judgment by the High Court the applicant was chased away from her property leaving behind her personal effects including clothing and is constrained to seek refuge from others; and that the question whether a partnership exists between the parties is an arguable one.
11. On the question whether the intended appeal will be rendered nugatory unless the orders sought are granted, Mr. Musau submitted that there is a risk that the respondent being in exclusive possession of plot numbers **[particulars withheld]** on which the “matrimonial home” stands can damage or sell it as he has sold joint property before and the applicant will continue to suffer as she and her daughter cannot access her property neither can she access her personal effects, clothes or also personal documents including the evidence of ownership of the property.
12. Opposing the application Ms. Gichuki for respondent referred us to the replying affidavit sworn in opposition to the application by the respondent on 13th January 2014 and submitted that there is no arguable appeal; that considering that the respondent had no capacity to marry the applicant having already been married under a monogamous system of law, the question of presumption of marriage does not arise; that there is also no arguable point on the issue of alleged partnership as **[particulars withheld]** Co. Limited in which the applicant claims to be a shareholder alongside the respondent is a separate legal entity which is not privy to these proceedings; that the applicant is not the owner of any of the properties that she claims and there is no evidence that the matrimonial home that the applicant claims is located on plot **[particulars withheld]** and the Court cannot grant orders with respect to property that might belong to another party; that plots **[particulars withheld]** belong to the respondent and the applicant has not presented any cogent evidence of any interest in those properties; and that the allegation by the applicant that there is a child who will suffer is not true as the applicant has a home where she stays.
13. Counsel concluded by saying that the applicant has not demonstrated that she has an arguable appeal that will be rendered nugatory if the orders sought are not granted and urged us to dismiss the application with costs.
14. In his brief reply Mr. Musau submitted that applicant has been living on the properties and that there is no evidence by the respondent that he is the owner of the properties. The applicant therefore should be restored to the position she was in prior to delivery of the judgment by the High Court pending determination of the appeal.

Determination

15. We have considered the application, the affidavits and the submissions by learned counsel for both parties. The power to grant or refuse relief under Rule 5(2)(b) of the Rules of this Court is discretionary. In order for us to exercise that discretion in her favour, the applicant must satisfy us that the intended appeal is arguable and that if we refuse to grant the orders she seeks the intended appeal will be rendered nugatory. Does the applicant's application meet these criteria?
16. Based on the pleadings and material placed before the High Court it is common ground that the parties had a long-term relationship spanning about 16 years, which the trial judge described as illicit. Initially, that relationship was in the nature of an employer/employee relationship but soon transformed. According to the applicant she became a wife and business partner to the respondent and contributed to the acquisition of assets including the properties that are the subject of this application. The respondent on his part described the applicant as schemer out to unjustly enrich herself and a licensee in his home. The trial judge found as a fact that that relationship was neither a marriage nor a partnership. The applicant contends that the learned judge's findings regarding the nature of the relationship went against the weight of the evidence. That will be a matter for determination by this Court at the hearing of the substantive appeal and the less we say on the matter the better. Despite the circumstances in which the applicant placed herself, at an intersection of law, justice and morality, bearing in mind that an arguable appeal is not one that will necessarily succeed, we are not prepared to say that the intended appeal, at least on the question whether the learned trial judge was right in holding that a partnership between the parties did not exist, is frivolous.
17. On the question whether the intended appeal will be rendered nugatory unless we grant the orders the applicant seeks, we have had regard to the fact that the applicant resided in "Katelembo House," though according to the respondent as a licensee, until her eviction after delivery of the judgment by the High Court. The applicant claims a proprietary interest in that property and contends that her personal effects and documents are held in that house. It was also contended that the title documents with respect to those properties are in the process of being issued. If she is kept out of the property, as it has no title against which the applicant can lodge a caution or caveat, the respondent may dispose of it. Besides, the applicant and her daughter will have suffered immensely which suffering cannot be redressed.
18. In the circumstances we accede to the applicant's request and order of mandatory injunction that the respondent is hereby restrained from blocking the applicant from accessing plots *[particulars withheld]* in Katelembo Athiani Mavuti Farmers and a Ranching Cooperative Society Limited. The respondent is also restrained from disposing or transferring the said plots pending the hearing and determination of the intended appeal.
19. The applicant shall within 90 days from the date of delivery of this ruling lodge the record of appeal failing which this order shall automatically lapse.
20. Costs of the application shall abide by the outcome of the appeal.

Dated and delivered at Nairobi this 14th day of March, 2014.

D. K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

REGISTRAR