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IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MATRIMONIAL CAUSE NO. 5 OF 2004

ELIZABETH GIKENE APPLICANT

VERSUS

JOHN ZACHARIA GIKENE RESPONDENT

—

Date of last order – 13/2/2006

Date of Ruling – 28/3/2006

RULING

Oriyo, J.

Pending the determination of a petition instituted in this court for Divorce, Custody, Maintenance, Division of Matrimonial Assets and Damages, the Petitioner prayed for temporary injunctive reliefs to restrain the respondent from alienating the matrimonial assets. Another prayer was for an interlocutory order for the preservation and inspection of the matrimonial properties and those properties belonging to the applicant prior to the hearing of the suit.

The application was brought under Order XXXVII rule 1 and 8 and Section 68 (e) of the Civil Procedure Code, 1966. It was supported by the affidavit of Elizabeth Gikene, the applicant. The

reasons advanced in support included the fact that the applicant and the respondent had been married and had lived as husband and wife since 1988 and blessed with two issues of the marriage. During their cohabitation at various places including Nyagasense Village in Serengeti District and Tegeta in Dar es Salaam, they acquired several properties. According to Annexure "B" to the affidavit the properties were located at Nyagasense Village, Mugumu, Tabora, Dodoma and Dar es Salaam. The assets included several houses, plots, farms, motor vehicles, milling machines, household items, etc. Other reasons behind the application were the respondents monogamous marriage to one Moshi Shabani; her being thrown out of the matrimonial home and the respondent's instructions that the applicant should not be allowed access to their homes and or matrimonial properties which included her personal belongings at Nyagasense Village and Tegeta. These acts of the respondent made the applicant fear alienation of the matrimonial properties by transfer of ownership to Moshi Shabani or by way of sale.

The respondent opposed the application through his own counter affidavit; but conceded that there was a sexual relationship between him and the applicant between 1989 to 1997. Otherwise he

denied the two issues of the relationship. He also denied to have jointly acquired matrimonial assets with the applicant. He stated further that the applicant was not thrown out of the Tegeta home because she had never resided there. He also denied any process of alienation of the properties.

At the hearing, the applicant was represented by M/S South Law Chambers Advocates, learned counsel, together with the Tanzania Women Lawyers Association (TAWLA) legal aid providers. The respondent was represented by M/S Kakamba and Partners Advocates, learned counsel.

In support of their respective positions above, each party relied on the principles applicable for an injunction to issue as laid down in the famous decision of this court in the case of **ATTILIO VS. MBOWE** (1969) HCD 284. For the applicant it was argued that there were serious questions of facts to be decided on the existence of a marriage and the issues, prayers for divorce, maintenance, custody, division of matrimonial assets, etc. It was contended that since the respondent admitted the existence of sexual relationship but denied the existence of the marriage and the issues for the first time; there

was a high probability of applicant being successful. On the second condition it was argued that court's interference was necessary to prevent the alienation of the matrimonial properties because if alienated, the applicant would suffer irreparable loss. The applicant contended, in addition, that the law required proof of condition two by affidavit as sufficient; which she had duly done. The third condition that the applicant would suffer greater hardship if the injunction was refused than what the respondent would suffer if the same was granted; the incidences cited were the fact that the applicant had been thrown out of the matrimonial home; had been denied access to matrimonial properties including personal properties like her clothings and fact that the respondent was enjoying with Moshi Shabani the matrimonial properties acquired with the applicant.

On the other hand, the respondent argued that the first condition in **ATTILIOS** case was not satisfied on the existence of serious questions because both the petition and the applicant's reputation are questionable and are matters to be established. On the second condition, the respondent argued that the applicant had failed to provide tangible evidence of alienation of property or any

proof of injury to her. On that basis, he submitted that in the absence of proof of injury to the applicant and the absence of proof of mischief to be fought by an injunction; the applicant had failed to satisfy the 3 conditions laid down in **ATTILIO'S** case.

ORDER XXXVII, rule 1 of the Civil Procedure Code, provides:-

"Where in any suit it is proved by affidavit or otherwise –

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or suffer loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree, or

(b) N/A.

the court may by order grant a temporary injunction to restrain such act, or make such other order *for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss of value,*

removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders.”(emphasis supplied)

The issue for determination here is whether the conditions laid down in **ATTILIO VS MBOWE** exist in this case to justify the grant of an order of temporary injunction.

The respondent has correctly argued that mere allegations of existence of serious issues or possible irreparable injury to the applicant is not sufficient. But I hasten to add that the law as reproduced above does not require tangible proof either. In the case at hand, the applicant did not make mere allegations because the existence of serious issues to be decided upon by a court of law and possibility of injury if an injunction is refused; were made on oath in her affidavit in support of the application. In my considered view, the pleadings raised very serious issues of facts for determination, which include on whether there was any form of a marriage between the parties; whether the applicant and the respondent were blessed with any issues; and if yes, in whose custody were the issues to be placed and finally the issues of maintenance and division of matrimonial assets. Due to the existence of these issues for

determination; there is no dispute that any alienation of the properties before determination of those issues may result in serious, adverse, irreparable consequences to the applicant.

The object of a temporary injunction is to maintain the ***status quo*** pending the determination of the issues. The provisions of Order XXXVII rule 1 of the Civil Procedure Code are also provided for under SECTION 138 (1) of the LAW OF MARRIAGE ACT 1971 which states:-

"Where –

(a) any matrimonial proceeding is pending,

or

(b) (c) (d) N/A

the court shall have power on application –

(i) N/A

(ii) If it is satisfied that any disposition of property is intended to be made with any such object, to grant an injunction preventing that disposition.

(2) For the purposes of this section "disposition" includes a sale, gift, lease, mortgage or any other transaction whereby ownership or possession of the property is transferred"

Further powers of this court are provided under Order XXXVII rule 8 (1) (a) of the civil Procedure Code as amended by GN 508/91 as follows:-

"(1) The court may on the application of any party to a suit and on such terms as it thinks fit –

(a) make an order for the detention, preservation or inspection of any property which is the subject matter of such suit, or as to which any question may arise therein."

On the foregoing, I find that the conditions for the grant of temporary injunction to restrain the respondent from alienating the matrimonial properties exist and it is accordingly granted. For the same reasons, the prayer for the preservation of the matrimonial properties and those properties belonging to the applicant until determination of the suit is granted.

Costs to follow the event.

K.K. Oriyo

JUDGE

28/3/2006

1,409 words