



SMK v SMK (Civil Case 32 of 2018) [2023] KEHC 120 (KLR) (Family) (20 January 2023) (Ruling)

Neutral citation: [2023] KEHC 120 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL CASE 32 OF 2018
MA ODERO, J
JANUARY 20, 2023

BETWEEN

SMK PLAINTIFF

AND

JKM ALIAS MMK DEFENDANT

RULING

1. Before this court is a notice of motion applicant dated June 23, 2022 by which the defendant/applicant JKM alias MMK seeks the following orders:-
 - “ 1. That the defendant be granted leave to amend her defence as per the draft annexed hereto and
 2. That The costs of this application be in the cause.”
2. The application which was premised upon section 100, order 8 Rule 3,5 (1) and Order 51 Rule 1 of the Civil Procedure Rules 2010. Section 3 and all other enabling provision of was supported by the affidavits of even date sworn by the applicant.
3. The plaintiff/respondent SMK opposed the application through his replying affidavit dated June 23, 2022. The matter was canvassed by way of written submissions. The applicant filed the written submissions dated September 15, 2022 whilst the respondent filed the submissions dated September 16, 2022.

Background

4. The plaintiff and the defendant herein got married in the year 1986. However, the couple later divorced on October 5, 2018 vide Milimani Commercial Divorce Cause No 237 of 2008.



5. Following the Divorce the plaintiff filed an Originating Summons dated seeking division of matrimonial Property. The suit was initially being handled by Hon Lady Justice Asenath Ongeru who referred the matter for court Annexed Mediation. The mediation was not successful and thus the matter was to proceed for full hearing. The trial Judge Hon Justice Ongeru was then transferred to the Kericho High Court this court took over the matter.
6. Before the hearing could commence the applicant filed this motion seeking to amend her defence to include a counterclaim.
7. The applicant avers that during the course of their marriage the couple acquired several properties both in Meru and in Nairobi. That all the properties so acquired were registered in the name of the respondent who took advantage of the trust, which the applicant had in him.
8. The applicant alleges that the respondent has hidden away the ownership documents for the properties which they acquired.
9. The applicant further alleges that the respondent failed to disclose his suit two (2) of the matrimonial properties being LR No. Kiirua/ Kiirua and Ntima/Igoki/xxxx.
10. The applicant further averred that during the pendency of their marriage, the couple acquired other properties including plots in Ruai Thome, Meru and Tharaka Counties, which properties the respondent has failed to disclose and has refused to share their details with the applicant. Hence the present application to amend her defence.
11. The applicant submits that the proposed amendments will enable the court to appreciate all the relevant issues and will assist the court reach a just determination of the matter. That the proposed amendments will not in any way prejudice the respondent as he will have ample opportunity to respond to the same.
12. As stated earlier the application was opposed. The respondent averred that the application amounted to a gross abuse of the court process and lacked merit.
13. The respondent argued that the suit had already been fixed for hearing and directions had been given before the trial judge was transferred to another station. That the applicant has had a period of over fifteen (15) years to make amendments to her defence but instead chose to wait until the last minute to do so, which delay was inordinate. He argued that the pleadings were now closed and that any amendments at this stage would be prejudicial to his case.
14. The respondent argued that in any event the two properties cited by the applicant had been gifted to him by his late father PMR during his lifetime. That the two properties being gifts 'inter vivos' from his late father cannot be deemed to be matrimonial property.
15. The respondent submitted that neither himself nor the applicant made any contribution towards the acquisition of the two properties and as such they cannot be taken to be matrimonial properties. The respondent added that he was aware that the applicant's late father MM also gifted her with properties and asserted that the parties cannot legally treat inherited properties as matrimonial property.
16. Finally the respondent submitted that the current application was incompetent and urged the court to dismiss the same entirely.

Analysis and Determination

17. I have carefully considered this application, the Reply filed thereto as well as the written submissions filed by both parties.



18. The applicant seeks the leave of the court to amend her defence so as to include a counterclaim. She argues that the respondent deliberately failed to include in his summons certain properties which she alleges constitute matrimonial property. The applicant submits that the proposed amendments will not be prejudicial to the respondent but will in fact assist the court reach a just determination of the suit.
19. On his part the respondent in opposing the application contends that pleadings in this matter had already been closed and as such the current application is time barred. That if the application is allowed he stands to suffer prejudice and injustice.
20. Section 100 of the *Civil Procedure Act* provides:-
“The court may at any time, and on such terms as to costs or otherwise as it may think fit amend any defect or error in any proceedings in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.” (own emphasis)
21. Order 8 Rule 3(1) of the *Civil Procedure Rules* provides:-
(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”
22. Order 8 Rule 5(1) of the *Civil Procedure Rules* provides:-
“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.” (own emphasis)
23. Therefore the court does have the authority in law to grant a party leave to amend his/her pleadings. Such amendments are ordinarily granted in order to present before the court all relevant material to enable the court make a determination on the real question in controversy between the parties and in order to avoid a multiplicity in suits.
24. In the case of *Institute for Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR the court held that:-
“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings..... The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.” (Own emphasis)
25. Therefore the factors which the court must bear in mind when determining whether or not to allow an application for amendment is firstly whether the proposed amendment introduces new and/or



inconsistent issues. Whether there has been undue delay in bringing the application for amendment and whether the proposed amendment will be prejudicial to the other side.

26. The Court of Appeal in the case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Ltd* [2013] eKLR set out guiding principles for amendment of pleadings as follows: -

“The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed *Civil Procedure Rules* under which the application was brought was summarized by this court, quoting from *Bullen and Leake & Jacob's Precedents of Pleading* - 12th Edition, in the case of *Joseph Ochieng & 2 others v First National Bank of Chicago*, Civil Appeal No 149 of 1991 as follows:-

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”

27. It is common ground that the parties herein got married in the year 1989 and that their union was legally dissolved vide a divorce granted in the judgment dated October 5, 2018. The suit now pending before this court is a suit filed for division of matrimonial property.
28. The respondent has argued that the application was not filed in a timeous manner coming almost fifteen (15) years after the suit had been filed. This may well be so. However, I note that the hearing of the suit is yet to commence. In the circumstances, I fail to see what if any prejudice the respondent stands to suffer if the amendment is allowed. In any event, the Respondent will be granted ample opportunity to respond to the said amendment.
29. The proposed amendments relate to two properties, which the applicants claim as matrimonial properties. The respondent counter that the said properties having been gifted to him by his late father do not constitute matrimonial properties. These are issues, which in my view can only be properly addressed during the hearing of the suit.
30. The issue for determination in this suit is the identification of matrimonial properties and the division of the same. In the circumstances, proposed amendments cannot be said to be inconsistent nor can they be said to be introducing a new cause of action. It is my view necessary that the proposed amendments be allowed to enable this court determine the real issue in controversy between the parties and to enable the court determine the suit on its merits.
31. Finally I allow this application and make the following orders:-
- i. The applicant be and is hereby granted leave to amend her defence and counterclaim in terms of the draft attached to her application;
 - ii. The amended defence and counterclaim is to be filed and served within fourteen (14) days thereof.



- iii. The respondent shall have fourteen (14) days to put in his response to the same if need be upon which the applicant shall have seven (7) days to put in a further replying if need be.
- iv. Since this application has been necessitated by the applicants indolence, the applicant will pay the costs for the same.

DATED IN NAIROBI THIS 20TH DAY OF JANUARY, 2023.

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MAUREEN A. ODERO

JUDGE

