



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL CASE NO. 14 OF 2019 (OS)**

**(FORMERLY HCCC NO. 1382 OF 1996 (OS))**

**J M N.....APPLICANT**

**VERSUS**

**R W M.....RESPONDENT**

**RULING**

1. The applicant J.M.N. and the respondent R.W.M. got married under the **Christian Marriage and Divorce Act** at the P.C.E.A. Church in Kiambu on 5<sup>th</sup> May 1979, and were blessed with three children who were born on 2<sup>nd</sup> June 1979, 3<sup>rd</sup> July 1980 and 22<sup>nd</sup> April 1982, respectively. The respondent petitioned for divorce in **Divorce Cause No. XX of 1994**. The marriage was dissolved on 25<sup>th</sup> January 1996.

2. On 14<sup>th</sup> June 1996 the respondent filed this originating summons seeking the declaration that the following properties, and the developments and improvements thereon, had been acquired by their joint efforts during the subsistence of the marriage and registered in the name of the applicant, and that the court should order their division as it deemed fit:-

- a) Magutu/Ragati/XXX in Nyeri;
- b) Mwerua/Kiandai/XXX in Kirinyaga;
- c) Gaturi/Githimu/XXX;
- d) Gaturi/Githimu/XXX; and
- a. e) Gaturi/Githimu/XXX.

3. On 17<sup>th</sup> September 1997 the applicant filed a replying affidavit to deny that the properties were acquired during the marriage or that the respondent had contributed to their acquisition or development. His case was that he had alone obtained loans to purchase the properties. From the replying affidavit, the properties were acquired while the parties were married.

4. The matter was mentioned by the court several times. On 17<sup>th</sup> June 1996 counsel for the parties consented to the order that neither party should dispose of any of the properties until the cause is heard and determined. The matter was in the Civil Division of the High court. On 14<sup>th</sup> March 2019 it was transferred to this Division. In this Division, the matter came up on 25<sup>th</sup> July 2019 when counsel were present, but it was adjourned.

5. It is notable that on 17<sup>th</sup> September 2018 the respondent filed an application dated 29<sup>th</sup> June 2018 for directions on hearing, now that pleadings had closed and the matter was ready for hearing. On 1<sup>st</sup> February 2019 she wrote to court through her advocate to complain that the application for directions had been listed for hearing on 10<sup>th</sup> October 2018 which turned out to be a public holiday. She complained that the representative of her advocate (Judy Thongori & Co. Advocates) had on several instances requested for the above file at the registry in order to fix the application for hearing, but that she had been told the file was not available. On 18<sup>th</sup> June 2020 the court heard the application and directed that the matter was ready for hearing and that an early date be taken.

6. The present application is dated 16<sup>th</sup> November 2021, brought by the applicant to have the suit marked as abated and stale on the basis of laches. In the supporting affidavit, the applicant stated that the dispute had been in court for 25 years without being heard and determined. He stated that he lives with a disability after he slipped and fell on the back thereby sustaining a grievous back injury that had confined him to the bed all the time. His case was that after the divorce proceedings neither him nor his advocate (M/s Abuodha & Owino Advocates) has been served with any process regarding this dispute. He stated that during the last 25 days he had either charged and/or developed the properties, not knowing that this cause had been filed against him or that there were orders that had been made in the cause; that any division of the property based on the present values would be highly prejudicial to him. He swore that there was no time that Kanyi Kioge advocate acted in the matter. He stated that M/s Judy Thongori & Co. Advocates now acting for the respondent were not properly on record. He stated that the respondent went working in Namibia while he remained here to develop the property; and that the matter that has remained inactive in court for over 25 years without resolution should be dismissed as the respondent had failed to pursue her rights for far too long, leading him to believe that she had abandoned the claim.

7. The respondent's response was by way of a preliminary objection dated 29<sup>th</sup> November 2021 which sought the striking out of the application for offending the provisions of **section 42(1) (b)** of the **Limitation of Actions Act (Cap 22)** which basically provides that the **Act** does not apply to matrimonial proceedings.

8. The preliminary objection can be dealt with quite easily. The **Marriage Act (No. 4 of 2014)** defines "matrimonial proceedings" as proceedings instituted under Part IX of the **Act**, and include proceedings for the payment of maintenance or for custody of children instituted independent of a petition for a declaratory decree or for annulment, separation or divorce. The instant summons have been brought to declare that the properties in question are matrimonial properties that the respondent contributed to their acquisition and development. She sought that they be shared between them. The cause was brought under the **Married Women Property Act, 1882** which ceased to apply when the **Matrimonial Property Act (No. 49 of 2013)** was enacted. It is therefore evident that the present proceedings are not matrimonial proceedings. They are proceedings for the determination of matrimonial property. **Section 42(1)(b)** of the **Limitation of Actions Act** does not therefore apply to these proceedings. The preliminary objection is not sustained and is dismissed. I make no order as to costs.

9. As to whether the respondent has been guilty of laches which has led to the dispute being stale, the facts of the case do not support the applicant's case. The record shows that when the cause was filed through Ogenche & Co. Advocates, on 17<sup>th</sup> September 1997 O.J. Abuodha & Co. Advocates entered appearance for the applicant. On 4<sup>th</sup> April 2006 Kanyi, Koge & Co. Advocates took over the case for the respondent. On 2<sup>nd</sup> March 2018 Judy Thongori Advocate & Co. filed notice of change that was served. When the consent to preserve the estate was recorded on 25<sup>th</sup> June 1996 Mr. Ogenche was acting for the respondent and Mr. Omino was acting for the applicant. There were several mentions after that. It is notable that on 21<sup>st</sup> October 1998, for instance, Mr Omino was in court for the applicant. The same for the attendance on 4<sup>th</sup> March 2019. Mr. Omino continues to act for the applicant.

10. It follows that the averment by the applicant that he has been unaware of this cause or the orders therein is wholly untrue. The allegation that he has not been served with process in the cause is not true. He has always been represented by counsel who has participated in these proceedings. It is also true that the respondent had all along been pushing for the applicant to file response. After that, she pushed for the hearing of the application for directions on hearing. On 18<sup>th</sup> June 2020 the cause was certified ready for hearing. On 26<sup>th</sup> November 2020 the matter came for hearing. Mr. Omino for the applicant sought adjournment on the ground that his client was disabled and in Nyeri; that he could not travel to court. Hearing was adjourned to 29<sup>th</sup> April 2021. On the date the respondent and her advocate were ready but the matter could not proceed orally owing to covid-19 pandemic. It came for hearing on 18<sup>th</sup> November 2021. Mr Omino asked for adjournment because his client was unwell and absent. Secondly, that he had been served with a large document of evidence that he wanted to discuss with his client to be able to respond. He then asked that the present application that his client had filed be heard in priority. The application was opposed. The court directed the present application to be heard first.

11. In short, the applicant is largely responsible for the delay in the hearing and determination of this cause. He has told untruths about the history of this case. He cannot turn around to claim that the respondent has delayed the hearing of this case, or that she is guilty of laches.

12. The result is that I dismiss the application with costs.

**DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF FEBRUARY 2022.**

**A.O. MUCHELULE**

**JUDGE**