



AHA v FWN (Matrimonial Cause 6 of 2021) [2022] KEHC 10362 (KLR) (26 May 2022) (Ruling)

Neutral citation: [2022] KEHC 10362 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MATRIMONIAL CAUSE 6 OF 2021
CM KARIUKI, J
MAY 26, 2022
IN THE MATTER OF SCTIONS 2, 6, 7, 9, 12(1), 14 17(2) AND
17(3) OF THE MATRIMONIAL PROPERTY SECTION NO. 49
OF 2013
AND
IN THE MATTER OF DECLARATION, PRESERVATION AN DIVISION
OF MATRIMONIAL PROPERTY

BETWEEN

AHA APPLICANT

AND

FWN ALIAS PWN RESPONDENT

RULING

1. By amended Notice of Motion dated 17th February, 2022 the applicant seeks inhibition and injunctive reliefs inter alia against the respondent in relation to L.R No. Nyandarua/kirima/xxxx) pending the hearing and determination of the instant suit.
2. The motion is supported by affidavit of Applicant sworn on 10th February, 2022. The parties agreed to canvass application in via submission.

Applicant case and submissions

3. The brief facts of this case are that the parties herein got married under the Sharia Law on 3/1/2020 at Nyahururu Jumia Mosque. According to the Applicant, the marriage was formalized after a long-time cohabitation as husband and wife which started in November 2017 when the respondent was a student at Laikipia university.



4. The applicant started maintain the respondent including but not limited to paying her school fees and he even went ahead to open a saloon business for her at [Particulars Withheld] after she completed her education.
5. In the course of their marriage, the applicant bought L.R No Nyandarua/kirima/xxxx and he developed it with hopes that the same was to serve as their matrimonial home and he had the land registered in the respondent's name to hold it in trust. Things changed and the marriage fell apart due to treacherous behaviour by the respondent who had deserted the matrimonial home eloping with men and the marriage was eventually dissolved under the Islamic laws on the 21/10/2020.
6. The applicant has in his Originating summons dated 9/8/2021 sought for distribution of properties acquired during their marriage including L.R No. Nyandarua/kirima/xxxx.
7. The Application dated 17/2/2022 basically seeks for preservatory orders on L R No. Nyandarua/ Kirima /xxxx. The applicant has annexed Mpesa statements and receipts in proof of contribution made towards purchase of the land and construction of the house erected on the land.
8. The purpose of an injunction is to preserve the substratum of the suit from being put to waste or alienated during the pendency of a trial.
9. The respondent in her replying affidavit confirmed that she indeed received contribution from the applicant in purchasing the land. The respondent has also averred that the property was acquired prior to the formalization of their marriage.
10. The applicant submits that, these are issues which can properly be addressed during the main hearing of the suit. There is great risk of the suit land being sold as the applicant has stated that the respondent has eloped to Rwanda with one Jose. It is therefore applicant submission that the respondent does not stand to be prejudiced if the injunction sought is granted and thus pray for the application to be allowed as drawn.

Respondent case and submissions

11. The applicant is seeking for a court declaration that the properties registered under the respondent's name are matrimonial properties and the same be sold and the proceeds be shared at the ratio of 80:20 in favor of the applicant. These are namely LR No. Nyandarua/Kirima/xxxx together with all the developments constructed erected therein, Salon equipments and appliances with an estimated value of Kshs. 900,000/= and A sum of Kshs. 520,000/= deposited in the respondent's account No. xxxx at Equity Bank to be refunded to the applicant.
12. The respondent in response to the application filed a replying affidavit dated 16th September 2021 wherein the respondent categorically disputed the applicants claim on her property as being matrimonial and prayed that the application as filed be dismissed for being unmeritorious, an afterthought.
13. The applicant in response to the respondent's replying affidavit filed a supplementary affidavit expounding on his supporting affidavit hence insisting that the listed properties are matrimonial. The respondent is entirely relying on her supporting affidavit.
14. She submits that, the issues for determination are that whether the properties as listed in pleadings are matrimonial properties?



15. She submits that, the Matrimonial Property is defined in Section 6 of the Act as follows:

Meaning of matrimonial Property For the purpose of this Act, matrimonial property means-
The matrimonial home or homes Household good and effects in the matrimonial home or homes: or Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.

Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.

A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.

16. The property claimed to be matrimonial property was acquired by the respondent before she got married to the petitioner. The Petitioner, during the interparty hearing produced sale agreement in proof of the same. The sale agreement is dated 3rd May, 2019 which date was almost a year before the parties herein got married.

17. There is no law that prohibits women from owning properties and for a long time, it has always been trite law that a title deed is the absolute proof of ownership of property. The title deed as produced is registered under the name of the respondent.

18. Section 26 of the [land registration Act](#), Act No. 3 of 2012, which is drawn as follows:

Certificate of title to be held as conclusive evidence of proprietorship.

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(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions, and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

On the ground of fraud or misrepresentation to which the person is proved to be a party; or.

Where the certificate to title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

19. The sale agreement as produced only has the name of the respondent as the buyer of the said parcel of land meaning the property is solemnly owned by the respondent and it being owned before marriage ceases at all cost to be matrimonial property.



20. It is the applicant's case that he was the financier for the purchase of the property and the developments on the parcel of land and therefore by virtue of that, the property should be marked as matrimonial property.
21. Of importance in this matter is as to whether the property was acquired during the marriage and as earlier state and according to the sale agreement and the marriage certificate, it is undisputable that this parcel of land cannot be whatsoever marked as matrimonial property and if at all the applicant can prove that he lent the respondent the amount towards the purchase of the property, he should seek redress under civil suits.
22. When the parcel of land was purchased, it had a house on it that was improved by the respondent by building a toilet and a bathroom to ensure it is a self-contained house. On record, are photographs that were produced by the respondent to prove the state of the house.
23. The applicant claims that he built a permanent house for the respondent that did cost him more than one million shillings. Owing to the above and with the evidence of the photographs produced by the respondent, it is clear to this honorable court that the house cannot cost the amount claimed by the applicant hence his lying traits should be detected by this court.
24. It is submitted that the salon business was solemnly the respondent's idea and the amount channeled towards the business by the respondent was approximately Kshs. 250,000/=. This money was out of the respondent's savings and the money gifted to her by the applicant before marriage as a way of luring her to accept his marriage proposal. Therefore, what remains for determination is as to whether gifts given before marriage amount to matrimonial property.
25. The applicant cites the case of *M V M Civil Appeal No. 74 of 2002* (2008) 1 KLR where the court of appeal states as follows:

“ ... Property inherited and gifted to one spouse before the marriage, and the property exists in the same condition as it was gifted or inherited..... The spouse to whom it was gifted should be allowed to retain it. The problem however arises when improvements are made using matrimonial resources the property ceases to be in its original form”

26. As for the sum of kshs 520,000/= deposited in the respondent's submits that, account no. xxxx at equity bank , the applicant did not at any point in time deposit such amount to her account. It is submitted that he who alleges must prove. Sections 107,108 and 109 of the Evidence Act provides erudite guidance in this area. They state as follows;

Section 107: Burden of proof

Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exist.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 108: Incidence of burden; The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Section 109 Proof for particular fact the burden of proof as to any particular fact lies in the person who wishes the court to believe in existence, unless it is provided by any law that the proof of fact shall lie on any particular person. See also *Evans Otieno Nyakwana – Versus – Cleophas Bwana Ongaro* (2015) eKLR .



Issues analysis and determination

27. After going through the affidavits by the parties, pleadings and submissions, I find the issues are; whether the applicant application is meritorious and what is the order as to costs?
28. He court makes observation that, what is under determination here is interim orders to preserve status quo pending decision on whether subdivision of matrimonial properties is available in this matter. The marriage between the Applicant and the Respondent has been dissolved a fact conceded by the respondent. To my mind therefore, the issue for determination is whether the Applicant has satisfied the court that he deserves the orders he is seeking.
29. There is no dispute that the Applicant and Respondent were married and before formalizing their marriage a land was acquired in respondent names which applicant claims he contributed to its acquisition. The respondent denies the same and gone ahead to put papers to show it is registered in her name. At stage it is important to note that the same property ownership is the core substratum of the instant suit and if it gets out of the respondent hands , the entire suit may collapse.
30. It cannot be denied that the spouses in their own way contributed to the marriage. It is my view that during the tenure of marriage, both parties acquired certain rights which this court must protect pending the hearing and determination of their hearing on distribution of the properties if proved to be merited upon proof of individual contribution towards its acquisition and /or improvement/ development.
31. The law under order 40 (1) of the *Civil Procedure Rules* provides as follows on the issue of when temporary injunctions can be granted:

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 wrongfully sold in execution of a decree; or
 - (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, 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, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
32. The respondent in her replying affidavit confirmed that she indeed received contribution from the applicant in purchasing the land. The respondent has also averred that the property was acquired prior to the formalization of their marriage.
 33. There may be risk of the suit land being sold as the Respondent is stated to have eloped to Rwanda with one Jose. The court also is of the view that the respondent does not stand to be prejudiced if the injunction sought is granted.
 34. I am persuaded by the court in *SJM v MK* [2020] eKLR where the court stated that:

“The Court’s first task is to determine if the Plaintiff has established a prima facie case with a probability of success once the full case is ventilated. I must be careful to reiterate that this first Giella factor does not suggest that the Applicant must establish with certainty that she



will succeed on the merits; only that she raises an arguable case with a probability of success (see, for example, *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125).”

35. Thus the court finds merit in the motion and grants same as prayed with order as to costs being in the main cause.

DELIVERED AND SIGNED IN OPEN COURT AT NYAHURURU THIS 26TH DAY OF MAY 2022,

CHARLES KARIUKI

JUDGE

