



REPUBLIC OF KENYA



KENYA LAW
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**PNG v LWW (Originating Summons E076 of 2021)
[2022] KEHC 10121 (KLR) (Family) (24 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10121 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

ORIGINATING SUMMONS E076 OF 2021

MA ODERO, J

JUNE 24, 2022

BETWEEN

PNG APPLICANT

AND

LWW RESPONDENT

RULING

1. Before this court is the Notice of Motion dated 25th October 2021 by which the Applicant PNG seeks the following orders:-
 - (a) Spent
 - (b) Spent
 - (c) Spent
 - (d) Spent
 - (e) Spent
 - (f) Spent
 - (g) That pending the hearing and determination of this suit, this Honourable court be pleased to issue an order compelling the Respondent to provide a comprehensive portfolio of her investments during the pendency of the marriage to ascertain any unidentified and undisclosed matrimonial properties.
 - (h) That pending the hearing and determination of this suit the Honourable court be pleased to make a declaration that all investments made by the Respondent during the Pendency of



the marriage including the admitted rental properties located in Kangemi developed by the Respondent form part of the matrimonial property.

- (i) That pending the hearing and determination of this suit this Honourable court be pleased to compel the Respondent to provide a comprehensive account of all the proceeds from the rental properties in Kangemi and other properties developed during the pendency of the marriage.
 - (j) That pending the hearing and determination of this suit, this Honourable court be pleased to direct the Respondent to deposit all future proceeds from the matrimonial properties in a joint interest earning account.
 - (k) That pending the hearing and determination of this suit, this court be pleased to prohibit and/or restrain the parties and/or their agents from transferring, alienating and/or dealing with the subject matrimonial property unless as directed by this Honourable court.
 - (l) That the costs of this Application be provided for.
 - (m) Any other orders that this Honourable court may deem fit to grant.”
2. The application was premised upon sections 2, 6(1), 7, 9, 14 and 17(1) of the Matrimonial Property Act, sections 1A, 1B, Sections 3A of the Civil Procedure Act, Chapter 21, Laws of Kenya. Orders 40 (1), (2), (31), (10), (11) and orders 51 of the Civil Procedure Rules 2010, section 52B of the Income Tax Act Chapter 470 Laws of Kenya and all other enabling provisions of the Law and was supported by the Affidavit of even date sworn by the Applicant.
 3. The Respondent LWW opposed the application through her Replying Affidavit dated 1st December 2021. The application was canvassed by way of written submissions. The Applicant filed written submissions dated 21st December 2021 whilst the Respondent relied upon her written submissions dated 14th April 2022.

Background

4. The parties herein got married to each other on 12th December 2008. Their union was blessed with three (3) children. However, disagreements arose between the couple and the Applicant filed in the Milimani Court Divorce Cause No. 995 of 2019 resulting in the dissolution of their marriage. A Decree Nisi Absolute was issued on 9th August 2021 (Annextrue PNG- to the Supporting Affidavit dated 25th October 2021).
5. The Applicant avers a during the marriage he provided for all the upkeep, education and medical expenses of their children as well as paying for rent and household utilities.
6. The Applicant further avers that out of his own funds and without any financial assistance/ contribution from the Respondent, he acquired the following properties:-
 - (a) ¼ acre land Thika-Karia Mwirukia Farmers Co-op Plot xxxx for Kshs 625,000/-.
 - (b) 1/8 acre land title number Ngong/Ngong xxxx and 1/8 acre land title number Ngong/Ngong xxxx both for Kshs 1,600,000/-
 - (c) 2 acre KJD/Kaputiei- Central/xxxx at Kshs 2,018,750/-
 - (d) ¾ acre land Nanyuki Marura Block xxxx for Kshs 900,000
 - (e) Motor vehicle registration number KBA xxxx Nissan Sunny Kshs 595,000/-“



7. The Applicant stated that despite his having solely financed the acquisition of the above properties the same were registered in the joint names of himself and the Respondent with the intention of utilizing said properties to secure the future of their children. That the Title Deeds are in the custody of the Respondent.
8. He states that although he and the Respondent earned a similar salary range, and despite her not contributing in any way to the household expenses the Respondent never disclosed any of the investments she made during the pendency of the marriage. That he only came to realize through pleadings filed by the Respondent in Childrens Case No. 400 of 2020 that she receives an income of Kshs 230,000 from rental properties in Kangemi.
9. The Applicant urges that the court compel the Respondent to disclose how she invested her income during the pendency of the marriage, so that any assets acquired during the marriage may be divided in terms of contribution made by the parties who were both in gainful employment at the material time.
10. In her Replying Affidavit the Respondent discloses that she was earning a net salary of Kshs 150,000 during the marriage. The Respondent insists that she did contribute towards the maintenance and upkeep of the family by paying for household utility bills, purchasing groceries and paying the house help's salary amongst other incidentals.
11. The Respondent asserts that she and the Applicant agreed that her salary should go towards household expenses and upkeep. She states that she did make indirect contribution towards the acquisition of the matrimonial properties which were registered in their joint names.
12. The Respondent states that she has made full disclosure of all the properties which she acquired during the course of the marriage. The Respondent states that she does not own any properties in Kangemi but that in preparation for her pending retrenchment, she leased land in Kangemi for ten (10) years. That she erected temporary iron sheet structures for rent on said leased land. That she pays rent for the leased land and utilizes the balance of the income to pay her house rent and the children's educational expenses. This is because the Applicant despite the existence of a court order has not made any financial provision towards the maintenance of the minors since the couple separated in December 2018.
13. She states that it is upon the Respondent to prove the existence of the additional investments which he claims that the Respondent made during the pendency of their marriage.
14. The Respondent confirms that she is holding the Title Deeds of their joint properties and asserts that the Titles are safe in her custody. That there is no way that any of the parties can sell and/or transfer said properties without the consent, authorization and/or participation of the other party. Finally, the Respondent submits that the application lacks merit and prays that the same be dismissed.

Analysis and Determination

15. I have carefully considered this application, the Affidavit filed in Reply as well as the written submissions filed by both parties. It is not in dispute that the Applicant and the Respondent were once married to each other. Equally, it is not disputed that their marriage now stands dissolved through a Decree Nisi issued on 9th August 2021.
16. The main issue for determination is whether the prayers sought in the application dated 25th October 2021 are merited. Section 6 of the Matrimonial Act No. 49 of 2013 defines matrimonial property to mean-
 - (a) the matrimonial home or homes



- (b) house hold goods and effects in the matrimonial home or homes.
- (c) any immovable or moveable property jointly owned and acquired during the subsistence of marriage.”
17. It is common ground that the assets listed by the Applicant were acquired during the pendency of the marriage. The Respondent has conceded that the Title Deeds for the said properties are in her possession. The Applicant has prayed for orders directing the Respondent to deposit the said Title Deeds in court for safekeeping.
18. There has been no allegation much less proof that the said Title Deeds are not safe in the hands of the Respondent. There is no evidence that the listed properties are under any threat of disposal, sale, transfer and/or alienation by the Respondent or by a third party.
19. The properties are registered in the joint names of the parties. It would not be possible for the Respondent to sell, transfer, or otherwise alienate those properties without the knowledge, consent and/or participation of the Applicant. I find no reason to justify an order that the Title Deeds be deposited in the court and I decline to order that the said Titles be deposited in court.
20. The Applicant has urged the court to make a declaration that the named properties as well as the Kangemi property be declared as matrimonial property pending the hearing and determination of the suit. This prayer is premature. The purpose of the suit is to determine which properties (if any) constitute matrimonial property. The court cannot make such a declaration before the suit is heard and before evidence is adduced by both parties. The suit cannot be determined through this application.
21. The Applicant has prayed for orders to compel the Respondent to provide a comprehensive portfolio of all the investments, which she made during their marriage in order to ascertain any unidentified and undisclosed matrimonial property. It is trite law that he who alleges must prove. If the Applicant is alleging the existence of some undisclosed matrimonial properties, then it is upon him to demonstrate to the court that such properties do in fact exist. The Applicant cannot file suit against the Respondent and then seek orders to compel her to provide him with the evidence to support his suit. If it is the Applicants position that the Respondent has failed to disclose matrimonial property then he will be at liberty during the hearing of the suit to demonstrate this fact. I therefore dismiss prayer No. (g) of this application.
22. Likewise I find that prayer No (i) seeking to compel the Respondent to provide a comprehensive account of all the rental income from the properties in Kangemi is premature. The Applicant by this prayer is engaging in a fishing expedition which the court will not countenance. This is a matter which can be dealt with during the trial of the suit.
23. The Applicant has prayed for orders to compel the Respondent to deposit all income derived from the ‘Kangemi property’ in a joint interest earning account. Again, this prayer is premature as there has been no finding or declaration that the Kangemi property constitutes matrimonial property. The Applicant will have to canvass their prayers during the trial of the suit.
24. In order to preserve the properties in issue pending the hearing and determination of the suit I do issue prohibitory orders in terms of prayer No. (k) of the Application.



25. Finally prayers (g), (h) (i) and (j) of the Application are found to have no merit and are dismissed. I do allow Prayer No. (k) and make orders as follows: -

“That the parties herein, their agents and/or assignees be and are hereby restrained from transferring, alienating and/or dealing with the subject matrimonial property pending the hearing and determination of this suit.”

26. Each party to meet its own costs.

DATED IN NAIROBI THIS 24TH DAY OF JUNE, 2022

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MAUREEN A. ODERO

JUDGE

