



AMC v FC (Civil Suit 76 of 2019) [2022] KEHC 12545 (KLR) (Family) (27 July 2022) (Ruling)

Neutral citation: [2022] KEHC 12545 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL SUIT 76 OF 2019
AO MUCHELULE, J
JULY 27, 2022
IN THE MATTER OF MATRIMONIAL PROPERTY ACT, 2013
AND
THE CONSTITUTION OF KENYA 2010

BETWEEN

AMC APPLICANT

AND

FC RESPONDENT

RULING

1 On November 29, 2019 the applicant AMC filed originating summons dated November 25, 2019 against the respondent FC under Articles 45 (3) and 68 (iii) of *the Constitution*, Sections 3 and 3A of the *Civil Procedure Act*, Orders 37 and 40 of the *Civil Procedure Rules* and Sections 2, 6, 9, 14 and 17 of the *Matrimonial Property Act*, 2013, seeking for the following orders:-

- “ 1) That a declaration do issue that the 5 acre, Matrimonial property located in Marula Lane, Karen together with all buildings and developments and all the portions resulting from its sub-division namely; LR No XXXX, LR No. XXXX, LR No XXX, LR No XXXXX, LR No XXXX, are owned jointly by the Applicant and Respondent and/or were held by the Respondent in trust for the Applicant.
- 2) That an Order do issue declaring that the properties listed hereunder and registered in the name of the Respondent and sold by the Respondent, were acquired jointly by the Applicant and Respondent and the Applicant is entitled to a share of or the sale proceeds therefrom:-



- i. LR No XXXX, Karen measuring 0.390500 Ha
 - ii. Muguga Jet Scheme/XXXX measuring 0.40 Ha and
 - iii. Muguga Jet Scheme/XXXX measuring 0.40 Ha.
- 3) That an Order do issue declaring that the Respondent is accountable to the Applicant in respect of all the sale proceeds derived from the sale of the properties listed hereunder:-
 - (i) LR No XXXX, Karen measuring 0.390500 Ha.
 - (ii) Muguga Jet Scheme/XXXX measuring 0.40 Ha and
 - (iii) Muguga Jet Scheme/XXXX measuring 0.40 Ha
 - 4) That an Order do issue declaring that the Applicant is entitled at the very least, an equal share either in kind or cash to the proceeds of the sale of the properties listed hereunder:-
 - (i) LR No XXXX, Karen measuring 0.390500 Ha
 - (ii) Muguga Jet Scheme/XXXX measuring 0.40 Ha and
 - (iii) Muguga Jet Scheme/XXXX measuring 0.40 Ha
 - 5) That an Order do issue declaring that the Applicant is entitled to 50% of all the rental income that the Respondent has been receiving from the Karen property aforesaid held in trust for the Applicant.
 - 6) That a temporary injunction do issue restraining the Respondent, his servants and/or agents from charging or further charging or alienating, wasting, damaging and/or otherwise interfering with the above mentioned properties pending the hearing and determination of the Originating Summons.
 - 7) That this Honourable Court be pleased to order that the properties and the income aforesaid be settled in proportions aforesaid or as the court may order.
 - 8) That the costs of the Summons be provided for."

2. It was her case that the two got married on 31st January 1970 in Church and got three children and that vide CMDC No xx of 1990 she successfully got the marriage dissolved. In the course of the marriage, she said, they jointly acquired various properties which included 5 acres at Marula Lane in Karen and 2 acres at Muguga Jet Scheme and which were registered in the respondent's name. The respondent had subdivided the Karen property into: LR No XXXX, LR No XXXX, LR No XXXX, LR No XXXX and LR No XXXX. He had sold LR No XXXX and utilised the proceeds alone. The Muguga property had been subdivided into Muguga/Jet Scheme/XXXX and Muguga/Jet Scheme/XXXX. He had sold both and utilised the proceeds without reference. He had transferred LR No XXXX to another person. All these transactions had been done without the applicant's consent. She filed the cause to lay a claim of all these properties that she said were matrimonial properties, jointly acquired. She feared that the respondent was going to either sell or transfer what was left in his name.



3. The applicant then filed a Notice of Motion dated 10th July 2020 seeking for the following orders:-

“ 1) That this application be certified as urgent and deserving hearing on an ex-parte basis in the first instance.

2) That pending the hearing and determination of this application, the respondent be ordered to surrender the matrimonial properties being LR No. XXXX Marula lane Karen and LR No XXXX Marula Lane Karen and the applicant be allowed to have the same leased out.

3) That pending the hearing and determination of the suit the respondent be ordered to surrender the matrimonial properties being LR No XXXX Marula Lane Karen and LR No XXXX Marula Lane Karen and the applicant be allowed to have the same leased out.

4) That pending the hearing and determination of the suit the respondent be ordered to surrender the matrimonial properties being LR No XXXX Marula Lane Karen and LR No XXXX Marula Lane Karen and the applicant be allowed to have the same leased out.

5) That the rental proceeds realised from rent be applied towards the medical expenses and care of the parties ailing daughter Catherine Njoki Chege. 6). That pending the hearing and determination of this application a temporary injunction do issue restraining the respondent, his servants and/or agents from wasting, charging, or further charging or alienating and/or otherwise dealing with the remaining portions of the matrimonial property namely: LR No 12159/30 Marula Lane Karen and LR No 12159/31 Marula Lane Karen.

6) That pending the hearing and determination of this suit a temporary injunction do issue restraining the respondent, his servants and/or agents from wasting, charging, or further charging, damaging or alienating and/or otherwise dealing with the remaining portions of the matrimonial property namely LR No XXXX Marula Lane Karen and LR No XXXX Marula Lane Karen.

7) That this Honourable Court be pleased to declare that the transfer and/or gifting of the matrimonial property known as LR No XXXX Karen., which is held in trust for the applicant as null and void.

8) That an order do issue declaring that the respondent is accountable to the applicant in respect of all the income and rent proceeds received from the suit properties aforesaid.

9) That this Honourable Court be pleased to make any orders it deems appropriate in the circumstances and in the interests of justice.

10) That the costs of this application be provided for.”

4. In the application she reiterated that the property in question was jointly acquired during their marriage, and she gave a history of their acquisition and her contribution.

5. The respondent filed a replying affidavit sworn on October 14, 2020 in which he stated that although the properties were bought in the course of their marriage he had solely bought them without the applicant's contribution, and gave the particulars. He further deponed that in the course of the



marriage he bought several other properties which he put into the applicant's name. She was contended with them so much that during the divorce proceedings she informed the court the following:-

“I do not want any property from my husband ... I do not want maintenance for the children and myself ...”

6. Regarding the Notice of Motion, he filed a preliminary objection dated October 14, 2020 whose grounds were as follows:

- “ 1) That the marriage between Applicant and Respondent was dissolved vide the Decree Nisi issued on 6th July 1992 and made absolute on February 5, 2001 in Resident Magistrate (Sheria House) Divorce Cause NoXX of 1990; AM v FC.
- 2) At the time of dissolution of the marriage aforesaid, and when the cause of action arose, the guiding provisions on settlement of the wife's property were Sections 27 (1), (2) and 31 (1) of the Matrimonial Causes Act, Cap 152 as read together with Rule 40 (1) of the *Matrimonial Causes Rules*.
- 3) By dint of Rule 40 (1) of the Matrimonial Causes Rules, the Applicant's application for settlement of her property ought to have been brought not later than one month after issuance of the final decree, except with leave of Court.
- 4) While one (1) month has already lapsed since February 5, 2001 when the final decree was made, no leave of court was/or has been obtained thus rendering the present proceedings incompetent.
- 5) By dint of Section 23(3) of *Interpretation and General Provisions Act*, unless a contrary intention appears, the repeal of a law does not affect applicability of the law in force when the cause of action arose. Particularly it does not:-
 - (i) Revive anything not in force or existing at the time at which the repeal takes effect; or
 - (ii) Affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or
 - (iii) Affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed;
- 6) Accordingly, the provisions of the *Matrimonial Property Act*, 2013 upon which the Summons are premised are inapplicable as they contradict the then applicable Matrimonial Causes Act, Cap 152 and the Rules thereunder by extinguishing the obligation to institute a claim for settlement or matrimonial within a stipulated timeline and thus creating a new right and/or privilege. The Summons are defective having been brought with conspicuously unexplained inordinate delay. Even if the Applicant's Summons were to be construed to be an ordinary suit for recovery of property, the same would still be defective having been brought more than twelve (12) years since when the cause of action accrued contrary to Section 4 (1)(e) and 7 of the *Limitations of Actions Act*, Cap 22.
- 7) In view of the foregoing, the Applicant's Originating Summons dated November 25, 2019 are thus not only actuated by greed and malice but are also misconceived and bad in law having contravened express statutory provisions and should be accordingly struck out with costs to the Respondent.”



7. The respondent then filed a replying affidavit to oppose the application. He stated that he bought the two properties (in Karen and in Muguga) without any assistance from the applicant, although they were then married. Regarding the Karen properties, he stated that he sold off LR No XXX in 1997 to offset a loan facility, and LR No XXXX to pay for his medical and to pay for fees for his children. In 2019 he transferred LR No. XXXX and LR No XXXX to Lucy Gathoni Chege to hold in trust for Kevin Kamenwa Chege and Peris Njoki Chege. That left LR No XXXX which he states that he intended to give to the applicant's children with him. He stated that he had in 1989 sold the Muguga property to pay for his medical following a road accident in 1988.
8. The applicant filed a supplementary affidavit sworn on November 1, 2021 to respond to the respondent's preliminary objection and replying affidavit. The respondent had deponed that he was employed as a pilot with the British Airways and that was how he raised money to buy some of the properties including the Karen ones. The applicant got the Commander of Police Airwing to write to say that the respondent never worked with them. She reiterated her contribution to the purchase of the properties, and then went on to state that after the dissolution of the marriage, in 1993 the respondent brought elders to her parent's home and the couple reconciled following which she went back to him and they remarried as husband and wife upto 2019 when he and his second wife threw her out. She claimed that this was another marriage, this time by presumption there having been a long cohabitation. She was reacting to the preliminary objection that she had taken too long to bring the cause and in the process she had offended the Matrimonial Causes Act (now repealed) and its Rules. The respondent did not file a further affidavit to respond to the allegation that the parties had remarried up to 2019. In his counsel's submissions reference was made to the originating summons and the supporting affidavit in which there was no reference to the marriage. In paragraph 32 of the supporting affidavit the respondent had stated as follows:-

“That during the 20 years we were married the respondent never contributed towards the needs of our family or pay for utility bills or employees and I had to pay for all the expenses.”

9. Whether the parties remarried upto 2019, and therefore which law between the Matrimonial Causes Act or the *Matrimonial Property Act*, 2013 should apply to the case, would require the calling of evidence on the matter. The respondent may feel that the applicant's claim of remarriage was an afterthought. However, he has not sworn any affidavit in that regard and therefore the matter will await evidence. For now, the claim has not been rebutted. As to whether the applicant should not be allowed to depart from her previous pleadings, again that will entail an inquiry into the evidence of the parties. This is important because a preliminary objection proceeds on the basis that all the facts pleaded by the other side are correct, and cannot be raised if any fact has to be ascertained (*Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696).
10. The consequence is that, given the facts of this notice of motion and cause, the objection is not sustained. It is dismissed with costs.
11. Regarding the notice of motion, there are a number of things that should be pointed out. First, the parties' daughter Catherine Njoki Chege was born on 1st June 1971 and is therefore 50 years old. She is not a child. The respondent has no legal obligation to support or maintain her. In *SNK v MSK* [2015] eKLR the Court of Appeal reiterated that a person who had attained the age of majority cannot qualify to get any statutory maintenance from his/her parents.
12. Secondly, there is the question of the Karen property and its five portions. The application related to three of the portions: LR No. 12159/30 and LR No 12519/31 and LR No 12159/33. The applicant sought a declaration that the transfer and/or gift of the property LR No. 12159/33 which



was a matrimonial property was null and void. First, this was final prayer that cannot be issued at this interlocutory stage. Secondly, the recipient of the transfer or gift was not made party to these proceedings and, consequently, no orders can be given over the property without the recipient being afforded a hearing. The respondent stated, and it was not disputed, that LR No 12159/30 has also been transferred to the same third party, Lucy Gathoni Chege. Again, no orders can issue over the property without reference to her.

13. That leaves LR No 12159/31 which is the only one in the respondent's name. The applicant sought that, by temporary injunction, the respondent be restrained from wasting, charging, further charging, damaging or alienating and/or otherwise dealing with the property. She is worried because she heard that the respondent had recently sold LR No XXXX for Kshs 50,000,000/=, had sold LR No XXXX and the Muguga properties and utilised the funds alone. She was apprehensive that the respondent may alienate this parcel before the cause has been heard and determined. The respondent denied that he wanted to sell the property. In fact, he stated that he wants to bequeath the parcel to his children with the applicant.
14. Depending on whether the marriage between the applicant and the respondent ended when there was dissolution on March 6, 1992, there will be the question why it has taken the applicant this long to move the court over the property. Should a discretionary order of injunction issue in case of such delay? If there was a subsequent marriage between 1993 and 2019 and the disposal of LR No XXXX was in 1997, LR No XXXX was in 2014 and LR No XXXX and LR No XXXX was in 2019 why didn't the applicant seek to protect these properties earlier? But more profound, the applicant testified during the divorce proceedings that she had no claim to any of the property of the respondent. That was in 1991. What has changed to make her want the property in question?
15. On the basis of *Giella v Cassman Brown* [1973] EA 358 and *Nguruman Limited v Jan Bonde Melson & 2 others* [2014] eKLR, I am not satisfied that at this interlocutory stage the applicant has shown a clear and unmistakable right which is directly threatened by the act sought to be restrained. The applicant has not demonstrated that she has a material and substantive claim to the property in question. The upshot is that I dismiss the notice of motion with costs.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2022.

A.O. MUCHELULE

JUDGE

