



REPUBLIC OF KENYA



GSO v EL (Civil Suit E012 of 2021) [2022] KEHC 15706 (KLR) (29 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15706 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL SUIT E012 OF 2021
JN KAMAU, J
NOVEMBER 29, 2022**

BETWEEN

GSO PLAINTIFF

AND

EL DEFENDANT

RULING

1. In his notice of motion dated July 21, 2021 and filed on July 22, 2021, the plaintiff herein sought orders that the defendant and her agents or proxies be restrained from assaulting, molesting, annoying or otherwise interfering with him in their matrimonial home in Kisumu/Chiga/xxxx (hereinafter referred to as the subject property) and that an order be issued to exclude her and her agents or proxies from the said subject property.
2. He swore an affidavit in support of the said application on July 21, 2021. He averred that he solely purchased the subject property which was jointly registered in his name and that of the defendant.
3. He asserted that the defendant was his wife having undergone customary marriage and that they were blessed with two (2) issues namely, LSO aged nineteen (19) years and PAO who was aged five (5) years. He added that he constructed a house during the subsistence of their marriage where he had lived on the subject property with his family for more than three (3) years.
4. He pointed out that the defendant was in full occupation of the subject property in which she was staying with another man and had denied him access to the said subject property.
5. He also contended that the defendant had accused him of having defiled his daughter which was reported as OB number 72 dated November 24, 2019 at Kondele Police Station but which case he stated, did not see the light of day. It was his averment that the defendant's acts were not only illegal but extremely unacceptable.



6. In opposition to the said application, the defendant swore a Replying Affidavit on 22nd November 2021. The same was filed on 23rd November 2021. She averred that she was in a relationship with the Plaintiff for nineteen (19) years until November 2019 during which period she bore two (2) daughters. She was emphatic that they were cohabiting and that they never married formally.
7. She stated that in the year 2010, she identified two (2) pieces of land. She explained that both she and the plaintiff executed one (1) Agreement for Sale while the Plaintiff executed the second Agreement for Sale on her behalf. It was her contention that she agreed to put the Plaintiff's name in the Agreements of Sale because they were in a relationship and had agreed to establish a home together. She pointed out that she paid the entire cost of Kshs 3,000,000/= for the construction of the subject property which was a three-bedroomed bungalow with a sitting room, kitchen, two verandas, chain-link perimeter fence and two (2) gates.
8. She averred that she cohabited with the Plaintiff in the subject property for three (3) years between August 2016 and November 2019 when he voluntarily moved out as their relationship had deteriorated and come to an end. It was her contention that she continued to reside in the subject property with the children.
9. She stated that she later came to learn that the mother title of the subject property was subdivided and parcels created therefrom, an issue that the Plaintiff started following up on. She asserted that after several years, he presented to her land transfer forms and an application for consent to transfer in respect of the subject property which she was advised was the title to their portion of land and that she signed them. She pointed out that that was how the subject property ended up duly registered in their joint names.
10. She contended that after perusing the records at the Lands Office and consulting a surveyor from the Department of Survey of the Lands Office Kisumu, she discovered that the area assigned to the Land Parcel Number xxxx was not the same as the subject property they acquired and that the areas assigned to the aforesaid parcel encompassed portions of land belonging to and occupied by four (4) of her immediate neighbours who were still awaiting for transfers and issuance of their titles.
11. She further stated that based on the circumstances, there was need to resolve the confusion as to who acquired portions of the mother title. She contended that no order could be made against the subject property without all the affected persons being made parties to these proceedings.
12. It was her case that since her relationship with the Plaintiff had ended and given that she paid almost ninety (90%) per cent of the purchase price for the title and solely paid for all the cost for construction of the house, the inclusion of his name as co-owner could not therefore confer upon him any right to exclusive possession of her home or any rights of ownership superior to hers and/or any right to eject her therefrom.
13. She further contended that she was ready to prove to this court of how she paid ninety (90%) per cent of the purchase price for the land and paid solely for the entire cost of constructing the house to establish that the Plaintiff's rights over the property under the law of equity were fiduciary, in that he was registered as a co-owner holding only a fraction of an interest therein and any further interest on a constructive trust for her as true equitable and lawful owner. She pointed out that she intended to seek such declaration orders from the court.
14. She further asserted that the plaintiff had been threatening her and her daughter on telephone that he would evict them, sell the subject property at a throw away price or charge it to a bank. She added that she had been compelled to register cautions on the subject property and also intended to seek orders restraining him from continuing this conduct.



15. She averred that the Plaintiff instituted the suit in bad faith, simply as a means of harassing her and not in pursuit of any lawful interest he had in the property wherefore he was not entitled to any orders he sought against her. She said that she had never seen the Sale Agreement for part of Kisumu/Chiga/xxxx for Kshs 130,000/= which he had exhibited as he entered into the transaction by himself. She added that the aforesaid document was a creature of fraud by the Plaintiff intended to advance the false claim of exclusive ownership of the suit property. She urged the court to dismiss the suit herein.
16. MAOA, the Defendant's father swore an Affidavit on 31st August 2021. The same was filed on 23rd November 2021. He asserted that her marriage to the Plaintiff was never formalised whether under civil or customary law and that the Plaintiff's visit to his home was merely to know where the Defendant came from.
17. On 7th December 2021, the Plaintiff filed a Further Affidavit that he swore on 15th November 2021 in which he reiterated the averments in his Supporting Affidavit and denied the assertions the Defendant had made against him.
18. On 11th April 2022, the Defendant swore a Supplementary Affidavit on 8th April 2022. She was categorical that the Plaintiff had physically abused her daughter and performed indecent acts on her as result of which she took her to Avenue Hospital for examination in his presence but that he had spitefully signalled to the doctor that she was mentally ill as a result of which her child was never examined and was discharged on the basis that she was fine.
19. She added that days later, upon having suspicions that her daughter was defiled, she took her to Russia Hospital at the Gender Section for examination where the doctor informed her that her daughter had been defiled and they were counselled. She said that she then reported the matter at Kondele Police Station and obtained OB Number OB/39/20/11/19 and was required to go for the P3 Form the following day. She stated that the Plaintiff was then barred from entering her home to secure the safety of her children.
20. It was her contention that the Plaintiff's claim was an attempt to trivialise the underlying circumstances that led to his arrest and the basis upon which he was barred by the police from entering the home and were thus unsubstantiated.
21. The Plaintiff's Written Submissions were dated December 1, 2021 and filed on December 6, 2021 while those of the defendant were dated January 10, 2022 and filed on January 17, 2022. The defendant's List and Bundle of Documents was also dated January 10, 2022 and filed on January 17, 2022. This Ruling is based on the said Written Submissions which parties relied on in their entirety.

Legal Analysis

22. The plaintiff submitted that the defendant wanted him out of the matrimonial home so that she could live with her boyfriend in the presence of their children by making false accusations against him. He placed reliance on the case of *Silverstone vs Silverstone* (1953) 1 ALL ER 556 where the court held that the husband had treated the wife with cruelty, was adulterous and that he was using his ownership of the house and cross-petition to remove her from the house and force her to withdraw her petition against him.
23. He also invoked section 3 of the *Marriage Act*, section 2 and 6 of the *Matrimonial Property Act* and argued that under section 17 of the *Married Women's Property Act*, 1882 which was repealed by section 19 of the *Matrimonial Property Act*, 2013, a party could apply to the High Court by summons in any question between husband and wife as to the title to or possession of property and the section was not pegged on the status of marriage of the parties. He also relied on the cases of *PNN vs ZWN* [2017]



- eKLR and *NCK vs GVK* [2015] eKLR which both addressed the rights of parties in relation to any property that is being contested under section 17 of the *Matrimonial Property Act*.
24. On her part, the defendant argued that the plaintiff offered no evidence of the existence of a marriage between him and did not rebut her father's affidavit evidence. She submitted that the *Matrimonial Property Act* was therefore not applicable herein. She referred this court to the cases of *Car Importers Association of Kenya vs County Government of Mombasa* [2021] eKLR and *Jokali Handling Services Limited vs Japheth Omondo Okwiri* [2021] eKLR amongst other cases but did not espouse the holdings she was relying upon.
25. Section 6 (1) of the *Matrimonial Property Act* defines matrimonial property as follows;
- “For the purposes of this Act, matrimonial property means;
- a. The matrimonial home or homes;
 - b. Household goods and effects in the matrimonial home or homes or;
 - c. Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.”
26. This court had due regard to the case of *TMW vs FMC* [2019] eKLR where it was held that:-
- “Basically for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property.”
27. Notably, both parties had delved into the merits of the substantive questions that were set out in the originating summons dated July 21, 2021 and filed on July 22, 2022. From the facts and the Written Submissions that the parties relied upon, it was evident that the existence of a marriage and that of a matrimonial property were in dispute.
28. The court thus restrained itself from analysing whether or not the parties were married as contemplated under the provisions of section 3 of the *Marriage Act* or whether the subject property constituted matrimonial property within the meaning of Section 6 (1) of the *Matrimonial Property Act*.
29. Indeed, the circumstances under which the Plaintiff left the subject property were a matter of contestation. These were not matters that could be resolved by way of affidavit evidence. These were matters of fact that ought to be ventilated in a full trial.
30. This court was therefore persuaded to find and hold that the Plaintiff had not established a prima facie case to warrant the grant of orders he had sought herein. On the other hand, this court came to a firm conclusion that the balance of convenience tilted in not granting the orders the Plaintiff had sought in his present application.
31. Notably, it was not in dispute that the Defendant was in possession of the subject property and that she was residing in the subject property with the children that were born out of her union and the Plaintiff herein. In view of the prevailing dispute, it would be unwise and most imprudent to order that the Plaintiff access and/or reside in the subject property as he had sought in his present application as it was evident from the affidavit evidence they each presented to this court that their relationship had irretrievably broken down.
32. Indeed, the children were staying in the subject property and there was likelihood of them being drawn into the dispute if the Plaintiff moved in before the outstanding issues had been resolved. In



addition, granting the orders the Plaintiff had sought at this interlocutory stage was likely to bring more acrimony between him and the Defendant herein.

Disposition

33. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's Notice of Motion application dated 21st July 2021 and filed on 22nd July 2021 was not merited and the same be and is hereby dismissed. Since this is a family matter, each party will bear its own costs of the application.
34. To progress this matter further, it is hereby directed that this matter be and is hereby fixed for Directions in respect of the Originating Summons dated 21st July 2021 and filed on 22nd July 2022 on 9th February 2023.
35. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 29TH DAY OF NOVEMBER 2022

J. KAMAU

JUDGE

