



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

CIVIL CASE NO. 84 OF 2019

IN THE MATTER OF MARRIED WOMEN PROPERTY ACT

BETWEEN

AJE PETITIONER/APPLICANT

VERSUS

MTLRESPONDENT

RULING

1. Before this Court is the Amended Notice of Motion dated **8th April 2020** by which **AJE** (the Petitioner/Applicant) seeks the following orders:-

1. SPENT

2. SPENT

3. That orders be granted to set out a fair environment for the administration of appropriation direction to respective matrimonial properties and the preservation of life for the Applicant and Respondent.

4. That all matrimonial properties be declared as such and that, change in ownership, Lease or change of use or movement be nullified.

5. That the Respondent be ordered to immediately release to the Applicant his clothing, welfare of USD 500 issued to her before her departure on November 4th to 2018 to Berlin Germany. An allowance she never submitted to the Applicant. The Respondent was at Job Group M two years ago.

6. That the Respondent be ordered to submit all the accrued welfare finances for 17 months ending April 4th 2020 to the Applicant thus 17,000 USD and thereafter to remit monthly spouse support until the conclusion of this matter. Attached a Ministry of Foreign Affairs and International Trade; (FSA) Foreign Service Allowance GUIDELINE of 2012 un-updated. [Annexed as FSA 1].

7. That since the Respondents Relatives by her unilateral directions; and without the consent or Authorization of the Applicant or the Honourable High Court of Kenya; have in their own choice ultimately enjoyed their stay at the Applicants Matrimonial Home and an dispossessed the Applicant the same. That Honourable High Court of Kenya Order them to pay the Applicant charges for their stay/damages are as follows at Kshs. 5000 per day as at 4th April 2020;

Name	Days	Charge
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(Kshs)

a. LL since August 2019	[244 days]	1,220,000
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- b. A since August 2019 [244 days] 1,220,000
- c. AP since January 2018 [821 days] 4,105,000
- d. C since January 2018 [821 days] 4,105,000

8. THAT Respondents Brother VL be ordered to pay for the Rental of the family car a Prado 120 [Particulars Withheld] which is Matrimonial Property that he has enjoyed use of since August 2019 at a market rate of Kshs. 15,000/- for 244 days as at 4th April 2020 as he has had it without the Applicants consent or authorization of the Honourable High Court of Kenya. His Charge is Kshs. 3,660,000/-.

9. That the all the illegal users of the Matrimonial Properties be ordered to return such properties and vacate the Matrimonial Home and be held to pay the Applicant the damages or Costs accrued to date without delay.

10. That the Applicant Humbly requests that the orders granted in this application be sent to Him and the Respondent by email and he can be contacted on phone as precaution due to the Current crisis, with the Covid-19 outbreak, and by such the Respondent be considered served. That the Applicants also be served by Whatsapp and Email to the Respondent.

a. Applicant details : AJE

i. Email: [Particulars Withheld]

ii. Phone: [Particulars Withheld]

b. Respondents Detail: MTL

i. Email: [Particulars Withheld]

11. That the Respondent be ordered can make deposits of payments to the Applicants Mpesa on +[Particulars Withheld]and Bank Account as the Honourable High Court of Kenya may be moved to determine.

Account Details: AJE	
Account Type	DTB Savings Account
Account Number	[Particulars Withheld]
Account Currency	Kenya Shillings
Account Branch	069-Koinange Street Branch

12. That the costs of this application be provided for.

13. That Costs be in the cause.

2. The Application was supported by the Grounds on the face of the same as well as the Further Supporting Affidavit dated 22nd January 2021 sworn by the Applicant.

3. The Respondent MTL opposed the Application through her Replying Affidavit dated 10th September 2020. The Respondent also filed a Notice of Preliminary Objection dated 15th May 2020 seeking to have the Application dated 8th April 2020 struck out on the following grounds:-

i. THAT the issues canvassed in the said application, involve reliefs being sought from parties who have not been enjoined as parties to this suit.

ii. THAT this Court lacks jurisdiction to entertain and/or grant some of the prayers sought by the Applicant under the Matrimonial Property Act.

4. The Application was canvassed by way of written submissions. The Applicant filed his written submissions dated 4th February 2021 whilst the Respondent relied on the written submissions dated 30th November 2020.

BACKGROUND

5. The Applicant and the Respondent got married to each other on 8th August 2008. The marriage was later dissolved vide a Decree Nisi on

25th September 2019 in Divorce Cause No. 648 of 2018. Prior to their divorce the couple lived in what the Applicant refers to as the 'matrimonial home' being House No. 25 Complex View Estate, Court C in Kasarani, Nairobi County.

6. The Applicant further contends that during the existence of the marriage the couple also acquired other properties which include:-

- Motor vehicle make Toyota Prado 120, Registration Number [Particulars Withheld].
- Apartment at Golden Mile Estate Ruaraka.

7. The Applicant seeks by this application to have the said 'matrimonial properties' divided between the Applicant and himself. The Applicant alleges that following their divorce the Respondent maliciously locked up his tools of trade, clothes and personal effects. That he was denied entry and access to the matrimonial home which the Applicant claims is now under siege by relatives and/or operatives of the Respondent.

8. The Applicant avers that at some period during the marriage the Respondent went to work in Berlin, Germany leaving him in Nairobi. That whilst in Berlin the Respondent was receiving family upkeep allowances and that she has failed to remit to the Applicant his share of this monetary welfare provision which he now prays that the Court order the Respondent to remit to him.

9. The Applicant protests that as a result of the Respondents actions he has been left homeless and has had to endure cold nights on the streets with no income or savings to sustain him. The Applicant seeks damages to compensate him for the cruel and discriminative actions of the Respondent in occupying the said matrimonial home together with her relatives / operatives to the detriment of the Applicant who has been rendered homeless. The Applicant also seeks a Court order for remittance to himself for back-dated rental income due to the occupation of the matrimonial home by the Respondents relatives.

10. As stated earlier the Application was opposed by the Respondent who filed a Replying Affidavit dated 10th September 2020. Whilst admitting that she was once married to the Applicant, the Respondent confirms that the couple are now divorced. The Respondent categorically denies that the Applicant made any contribution towards her acquisition of the property known as House No. 25, Complex View Estate, Kasarani and avers that she acquired the said property long before she met and married the Applicant.

11. The Respondent further avers that the Applicant made zero contribution whatsoever towards the purchase of the Toyota Prado vehicle which she single-handedly purchased through proceeds from her salary. The Respondent also averred that the Apartment at Golden Mile Estate, Ruaraka is managed by Golden Mile Park Management Company and that the Applicant has no role whatsoever in the said Management Company. Finally the Respondent asserts that the Applicant has made no contribution at all to the properties which he now terms 'matrimonial property' and therefore is not entitled to any share in the same.

ANALYSIS AND DETERMINATION

12. I have carefully considered the Affidavits and material placed before this Court as well as the written submissions filed by both parties. At the outset this Court must make a determination on the Preliminary Objection dated 15th May 2020 as the same challenges the jurisdiction of this Court to hear and determine the application. It is trite law that jurisdiction is everything without requisite jurisdiction a Court must immediately down its pen. In OWNERS OF THE MOTOR VESSEL "LILLIAN S" -VS- CALTEX OIL (KENYA) LIMITED [1989]KLR the Court of Appeal held as follows:-

"... By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision... If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics ... Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given" [own emphasis]

13. The definition of what constitutes a Preliminary Objection was set out in the celebrated case of MUKISA BISCUIT MANUFACTURING COMPANY LTD -VS- WEST END DISTRIBUTORS LTD [1969]E.A. where it was held:-

"... A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration." [own emphasis]

14. The Respondent contends that this Court lacks jurisdiction to Grant some of the prayers being sought under the auspices of the Matrimonial Property Act. Secondly the Respondent submits that some of the prayers in the application seek orders against third parties who are yet to be enjoined as parties to this suit.

15. Section 17 of the Matrimonial Property Act provides as follows:-

"(1) A person may apply to a court for declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.

(2) An application under subsection (1)-

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made as part of a petition in a matrimonial cause; and

(c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”
[own emphasis]

16. I have looked at the prayers which the Applicant seeks in this Application. The Applicant seeks to be awarded back-dated rent from persons whom he claims occupied the alleged matrimonial home. He also seeks orders for the eviction of said persons from the matrimonial home. These are persons who the Applicant has identified as relatives / operatives of the Respondent. **Section 17**, is specifically applies to orders which are being sought as against a ‘**spouse**’ or a ‘**former spouse**’. The persons from whom the Applicant is seeking orders for payments of rent, eviction and declarations of matrimonial property do not fall under this category.

17. Secondly none of the persons from whom the Applicant is seeking orders have been enjoined in this suit. They have not been heard by the Court. Courts can only grant orders as against parties who have been properly enjoined in a suit.

18. I have perused the written submissions filed by the Applicant. He has included in his submissions an Amended Notice of Motion dated **8th November 2020**. It is clear that after this Notice of Preliminary Objection was filed the Applicant sought to amend his Notice of Motion in order to make it compliant with **Matrimonial Property Act, 2013**. However there is no evidence that the Applicant sought and obtained leave from the Court before purporting to amend his application. Further there is no evidence that the Amended Notice of Motion was served upon the Respondents, and as such the Respondents were denied an opportunity to respond to the same. I find that the Amended Notice of Motion dated **8th November 2020**, is not properly on record, and as such I will disregard the same.

19. Finally I find that the application as framed is incompetent and as such I dismiss the Notice of Motion dated **8th April 2020**. Since the Court has not determined this matter on its merits the Applicant is at liberty to present a compliant application for consideration on the merits.

Each party to meet its own costs.

DATED IN NAIROBI THIS 31ST DAY OF MAY, 2021

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MAUREEN A. ODERO

JUDGE