



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**FAMILY DIVISION**

**MATRIMONIAL PROPERTY CAUSE NO.3 OF 2021(OS)**

**IN THE MATTER OF THE PROPERTY KNOWN AS ([Particulars Withheld] Apartment No. xxx along First Avenue Nyali Constituency)**

**BETWEEN**

**BWM..... PLAINTIFF**

**VERSUS**

**RM.....DEFENDANT**

**RULING**

1. By a plaint dated 19.3.21 and filed on 22.3.21, BWM (hereinafter the Plaintiff/Applicant) moved to this court against her alleged estranged husband RM (hereinafter the Defendant/Respondent) seeking orders that;

- a) A declaration that there exists a presumption of marriage between the Plaintiff and the Defendant and the two are legal wife and husband.*
- b) A declaration that the property known as Apartment xxx on the 4<sup>th</sup> Floor of The Hydro Luxrious Apartments along First Avenue in Nyali Constituency of Mombasa County in Kenya be declared as the Plaintiff's and Defendant's matrimonial home each being entitled to half-share of the same as joint tenants thereof.*
- c) An order directed at the Defendant to transfer half-share of Apartment 433 on the 4<sup>th</sup> Floor of [Particulars Withheld] Apartments along First Avenue in Nyali constituency of Mombasa county in Kenya to the Plaintiff within a period of Twenty-One days from the date of Judgment in default of which the Registrar of Titles does effect the same at the Defendant's cost.*
- d) Costs and other reliefs as the court deems fit to grant and interest.*

2. Contemporaneously filed with the Plaint is a Notice of Motion of even date seeking an order that, pending hearing and determination of the application and the suit herein, an order to issue restraining the Defendant, his agents, servants or any other person acting on his behalf from interfering, harassing, threatening or evicting the Plaintiff from Apartment No.xxx, 4<sup>th</sup> floor of the [Particulars Withheld] Apartments.

3. The application is anchored on the grounds stated on the face of it and averments contained in the Supporting Affidavit sworn on 19.3.21 by BWM. She averred that sometimes in the year 2015, she met and fell in love with the Defendant/Respondent. That they cohabited in various parts of the country as husband and wife and finally settled in Mombasa wherein they acquired the property now the subject of these proceedings.

4. She stated that she was single at the time while the Defendant/Respondent presented himself as a divorcee. It was further averred that owing to long period of cohabitation, she is a wife by virtue of presumption of marriage and that for all purposes and intent, she is entitled to a share of the property which was allegedly acquired during the subsistence of their marriage. She stated that all along she has been residing in the suit Apartment with her child and that the eviction notice and demand for rent from her by the Defendant amounts to acts of harassment as she is a wife and not a tenant.

5. On 22.3.21, the court certified the application urgent and granted prayer two on temporary basis pending hearing and determination of the application interpartes.

6. In response, the Defendant/Respondent filed a Notice of Preliminary Objection dated 22.4.21 contending that;

*i. There exists no marriage between the Plaintiff/Applicant and the Defendant/Respondent.*

*ii. The alleged marriage by the Plaintiff/Applicant (if any) has not been dissolved.*

7. On 29.4.2021, the Defendant/Respondent filed a defence and a Replying Affidavit sworn on 26.4.21 admitting that he met the Plaintiff/Applicant and became friends the year 2015. He however denied marrying the Plaintiff/Applicant. He further averred that he was married to one Farida with whom they contracted a monogamous marriage on 24.9.1982 and a marriage certificate marked RAM – 1 issued.

8. He denied ever residing in any part of Kenya nor living with the Plaintiff as husband and wife as alleged. He stated that he solely bought the house using funds from Germany and that the purchase price included 24 months' service charge. Regarding the claim by the Plaintiff that she supervised construction, the Defendant averred that the Apartment was bought as an off-plan arrangement which did not require the buyer to supervise its construction.

9. When the application came for hearing, parties agreed to canvass the same together with the Preliminary Objection dated 22.4.21. They further agreed to dispose the same through written submissions.

#### **Plaintiff's/Applicant's Submissions**

10. Through the firm of Khaminwa and Khaminwa advocates, the Plaintiff filed her submissions on 26.5.21 thus reiterating the averments contained in the affidavit in support of the application. It was submitted that the Plaintiff and the Defendant have been in a common law union since 2013. That they presented themselves to their relatives as husband and wife hence the presumption of marriage. In support of this submission, the court was referred to the holding in the case of **Hortensiah Wanjiku Yaweh -vs- Public Trustee, Civil Appeal No.13/1976.**

11. On the issue of eviction orders and levying distress against the Plaintiff, it was submitted that a wife cannot be treated as a tenant.

12. In response to the Preliminary Objection, it was submitted that determination of this court's lack of jurisdiction is critical in determining this matter at this stage. The Plaintiff opined that this court can refer this matter to the lower court for hearing and determination

#### **Defendant's/Respondent's Submissions**

13. The Defendant/Respondent filed his submissions on 2.6.21 through the law firm of Gichira J. W. and company advocates. Basically, the defendant adopted the grounds of Preliminary Objection and averments contained in the affidavit in reply.

14. Mr. Gichira submitted on two issues namely; whether from the evidence and material placed before court the Plaintiff has satisfied the conditions upon which a temporary injunction can be granted and, whether the Applicant is entitled to costs. It was counsel's submission that the Plaintiff has not met the threshold for grant of injunction pursuant to the principles established in the celebrated case of **Giella -vs- Cassman Brown & Co.[1973] EA 358.** wherein the court laid the test before grant of injunction as; proof of a prima facie case with high chances of success; a likelihood of the Applicant suffering of irreparable damage and balance of convenience.

15. Counsel submitted that the Respondent had no legal capacity to marry any other woman before dissolution of his monogamous marriage with one Farida. In this regard, counsel relied on **Section 9(a) of the Marriage Act** which prohibits a married person in a monogamous marriage from contracting another marriage.

16. Mr. Gichira further submitted that the court has no jurisdiction to determine matrimonial property before dissolution of a marriage pursuant to Section 6(3) of the Matrimonial Property Act. To fortify this legal position, the court was referred to the holding in the case of **ZSN -v- WNO [2019]eKLR.** where the court refused to share out matrimonial property before dissolution of marriage. Regarding the child mentioned by the plaintiff, it was submitted that the particulars of the child and the father to the said child was not proven.

#### **Analysis and Determination**

17. I have considered the application herein together with the Preliminary Objection in response thereto. I have also considered rival submissions of both counsel. Issues that arise for determination are;

*i. Whether the Defendant/Respondent has met the threshold for the Preliminary Objection to be upheld.*

*ii. If the Preliminary Objection is dismissed, has the Plaintiff/Applicant met the threshold for grant of injunction.*

18. Before I proceed to determine the application for injunction, (2<sup>nd</sup> issue), I am inclined to determine the Preliminary Objection first, which if favourably determined will dispose the entire suit in limine. In the celebrated case of **Mukisa Biscuit Company -vs- West End Distributors Ltd [1969]EA 696.** the court had this to say regarding a Preliminary Objection;

***“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”***

19. In the instant case, this court's jurisdiction has been challenged on grounds that it cannot determine the issues raised and then grant the reliefs sought as the alleged marriage between the two has not been dissolved. It is trite law that jurisdiction emanates from the constitution or written law. See **Samuel Kamau Macharia & another –vs- Kenya Commercial Bank & 2 Others, Supreme Court, Civil Application No.2/2011**. Further in the quite often quoted case of **“The Owners of the Motor Vessel “Lilian S” –vs- Caltex Oil (Kenya) Ltd [1989]eKLR**, Nyarangi JA held that, jurisdiction is everything and without it, a court cannot move any step further.
20. The suit herein was brought by way of a plaint seeking a declaration that Apartment No.xxx located at [Particulars Withheld] Apartments in Mombasa is matrimonial property hence should be shared out equally. Unfortunately, the Plaint does not specify the provisions under which it is being filed. Ordinarily, suits under Matrimonial Property Act are commenced by way of Originating Summons and the specific provision under which it is brought quoted.
21. Nevertheless, the Plaintiff/Applicant claims that she is a wife to the defendant through a long period of cohabitation hence a presumption of marriage. She further claimed that the property in question was acquired during the subsistence of the said marriage. These are all matters of fact requiring adduction of evidence which cannot be determined as a ground of Preliminary Objection. See **Mukisa Biscuit Company –v- West End Distributors Ltd [supra]**.
22. However, is failure to dissolve the marriage a ground to strike out the suit? Although not specified, division of matrimonial property is clearly provided for under **Section 7 of the Matrimonial Property Act** which states that;
- “Subject to Section 6 (3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”***
23. In the case of **ZSN –vs- WNO [supra]**, the court declined to proceed with determination of the suit before dissolution of marriage which was then pending.
24. According to the reliefs sought, the Applicant is seeking both declaratory orders and distribution of matrimonial property. Declaration of matrimonial property rights is enshrined under **Section 17 of the Matrimonial Property Act** which provides that;-
- “1) a person may apply to a court for declaration of rights to any Property that is contested between that person and a spouse.***
- 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.”***
25. From the reliefs sought, there are two facets of the suit. The first one is declaration of the property rights and two, division of matrimonial property. It is not in dispute that the alleged presumption of marriage has not been dissolved. Dissolution of the alleged marriage is critical to pave way for distribution of the subject property.
26. I do agree with the defendant that pursuant to Section 7 of the Matrimonial Property Act, this court has no jurisdiction to make determination on issues of division of matrimonial property the subject of this suit. However, this court has jurisdiction to make a determination on the prayer for declaratory rights under matrimonial property. This aspect of the law under Section 17 of the Matrimonial Property Act does not necessarily require parties to first dissolve their marriage.
27. In the case of **AKK –vs- PKN[2020] eKLR**, the Court of Appeal stated as follows:-
- “A plain reading of Section 17 enables a spouse, subsistence of marriage notwithstanding, to make an application for declaratory orders. It further states that that application may be made as part of a petition in Matrimonial Cause and notwithstanding that a petition has not been filed under any law relating to matrimonial causes. It is our opinion that the divorce cause does not prevent a party from bringing an action for declaration of rights to property in the High Court under Section 17 of the Act”.***
28. Similar position was held in **PWN –vs- ZWN[2017]eKLR**, where Waki J. stated that;
- “An inquiry may thus be made under Section 17 and declarations may be issued, the subsistence of marriage notwithstanding....”***
29. In view of the above quoted precedents, the Plaintiff is entitled to ventilate her claim on proprietary rights under Section 17 of the Matrimonial Property Act but minus any determination on distribution or division of the said property.
30. Having held as above, issues of facts as to whether there was a marriage and any property acquired during the subsistence of the marriage and parties' contribution will await the substantive hearing when parties shall adduce evidence. For those reasons, the Preliminary Objection herein cannot be sustained as it will not dispose of this matter in its entirety.
31. Having dismissed the Preliminary Objection, I am left with the injunction application. The principles under which an injunction order can issue are well settled in the case of **Giella –vs- Cassman Brown [supra]**, where it was held that a party seeking an injunction must;

establish a prima-facie case with a probability of success; Likelihood of suffering irreparable damage which cannot be compensated in monetary terms; and lastly, proof that on a balance of convenience justice tilts in his favour.

32. Regarding the question whether there is a prima-facie case, the Applicant/Defendant has been living in the said house since its acquisition. She claims that she has been occupying that house as a wife and not a tenant as claimed by the Respondent. The Respondent did not submit any tenancy agreement between him and the Plaintiff nor any proof of previous remittance of rent by the Applicant. Given the documentary evidence attached to the application including photographs reflecting a close relationship between the two, the issue of tenancy arrangement does not seem to be probable nor convincing at this stage. To that extent, there is a prima-facie case established by the Plaintiff subject to further interrogation during the hearing.

33. As to whether the eviction being threatened to be executed is likely to expose the Applicant to irreparable damage, the same is likely to subject the applicant to embarrassment and premature removal from the premises without according her an alternative accommodation arrangement. To that extent, she is likely to suffer irreparable damage by being rendered homeless which may be difficult to recover in monetary terms. On a balance of convenience, parties need to be given an opportunity to ventilate their case on merit hence justice tilts in favour of granting an injunction.

34. From the above reasons stated, the order of injunction issued on 22.3.21 is hereby confirmed and the same shall remain in force until the suit is heard and determined.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MOMBASA THIS 24TH DAY OF SEPTEMBER, 2021**

**J. N. ONYIEGO**

**JUDGE**