



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**FAMILY DIVISION**  
**CIVIL SUIT NO. 10 OF 2019**  
**IN THE MATTER OF SECTION 2,6,7 AND 17 (1) OF THE MATRIMONIAL PROPERTY ACT NO. 49 OF 2013**

**WRK.....RESPONDENT**

**VERSUS**

**FM.....APPLICANT**

**RULING**

1. Before this court for determination are two applications. First is the **Notice of Preliminary Objection** dated **20<sup>th</sup> January 2021** in which the Applicant **WRK** objects to the Respondents originating summons dated **18<sup>th</sup> December 2020** on grounds that:-

**“1. The issues raised in the pleadings herein are completely similar to the issues raised in Civil Sit No. 10 of 2020 contrary to section 6 of the Civil Procedure Act 2010.**

**2. The application creates duplicity of suits.**

**3. That the Honourable court lacks substantive jurisdiction to determine the issues in dispute herein”**

2. The second application for the considering of the court is the Notice of Motion dated **18<sup>th</sup> February 2021** filed by the Respondent **FM** seeking the following orders: -

**“1. That this suit be consolidated with High Court Family Civil Suit No E002 of 2021 filed in Nairobi for hearing and determination.**

**2. THAT costs of this application be provided.**

3. Following directions made by the court the two matters were heard together by way of written submissions. The Respondent filed the written submissions dated **29<sup>th</sup> July 2021** whilst the Applicant relied upon her written submissions dated **8<sup>th</sup> July 2021**.

**BACKGROUND**

4. The applicant **WRK** instituted proceedings in **Matrimonial Case No. 10/2019** vide the Originating Summons dated **26<sup>th</sup> February 2019** seeking the following:-

**“1. THAT an order do issue declaring that there is no union of marriage between the Applicant and the Respondent.**

**2. THAT an order does issue declaring that the property known as Title Number Kiambu/Mun. Block 6/xxx together with the developments thereon is not matrimonial property;**

**3. THAT a mandatory injunction do issue against the Respondent compelling him to vacate the property known as Title Number Kiambu/Mun. Block 6/xxx forthwith;**

4. THAT the Respondent be ordered to surrender to the Applicant, the remote control keys to the gate and the main door and the regular keys to the two exterior doors of the Applicants house which he has forcibly withheld.
5. THAT a permanent injunction do issue against the Respondent, his agents, servants or any person acting by or through the authority restraining them from entering or being in close proximity to the property known as Title Number Kiambu/Mun. Block 6/xxx or any other property belonging to and/or registered in the name of the Applicant.
6. THAT a permanent injunction do issue against the Respondent, his agents, servants or any person acting by or through his authority restraining them from staking claim or taking possession of any property belonging to or registered in the name of the Applicant.
7. THAT the OCS police station be directed to assist in the execution and compliance of the above orders.
8. THAT the Respondent bears the costs of this suit”.

5. The Respondent FM on the other hand filed **Matrimonial Cause No. E002 of 2021 (OS)** in which he filed the **Originating Summons** dated **18<sup>th</sup> February 2021** seeking the following orders: -

- “1. That the court do make a presumption under section 119 of the Evidence Act that the marriage contracted by WRK and NM. On 9<sup>th</sup> day of February 1996 evidenced by a decree of divorce in 2003.
2. That the court do make a further presumption that FM and WRK were in a valid marriage since 2005.
3. That the court do make a declaration that the properties acquired within the cohabitation/marriage between the parties were matrimonial properties.
4. That this Honourable court be pleased to make such further orders as the interests of justice may require.
5. That the Respondent be condemned to pay costs of this Application and incidental thereto”.

6. Contemporaneously with the originating summons the Respondent also filed a Notice of Motion dated **18<sup>th</sup> February 2019** seeking the following orders:-

- “1. THAT this suit be consolidated with High Court Family Civil Suit No. E002 of 2021 filed in Nairobi for hearing and determination together.
2. THAT costs of this Application be provided for”.

7. Thereafter the Applicant filed the Notice of Preliminary Objection dated **20<sup>th</sup> January 2021**.

#### **ANALYSIS AND DETERMINATION**

8. I have considered the two applications before me as well as the written submissions filed by both parties. The only issue this court is required to determine is whether the suit filed by the Respondent being **Matrimonial Cause No. E002 of 2021** is *sub-judice*.

9. It is common ground that the Applicant filed the **Matrimonial Cause No 10 of 2019** on **20<sup>th</sup> February 2019**. It is not in dispute that **after** the Applicant had filed suit the Respondent then proceeded to file **Matrimonial Cause No E002 of 2021**.

10. The **Preliminary Objection** dated **20<sup>th</sup> January 2021** premised on the following grounds: -

- “1. That the originating summons in Civil Suit No E002 of 2021 dated 18<sup>th</sup> December 2021 raises completely similar issues to the ones raised in the Originating Summons dated 28<sup>th</sup> February 2019 in Civil Suit No. 10 of 2019, contrary to Section 6 of the Civil Procedure Act.
2. That the said Originating Summons creates duplicity of suits and is therefore, bad in law.
3. That this Honourable court should not countenance the consolidation of Civil Suit No. 10 of 2019 with a suit that is a nullity *an initio*”.

11. The Applicants submits that the suit filed by the Respondent raises the same issues and involves the same parties as the suit which was filed earlier by the Applicant herself. That the Respondent ought to have filed a reply to **suit No. 10 f 2019** as filed by the Applicant instead of filing a separate suit as this merely leads to a multiplicity of suits which amounts to an abuse of court process. That in light of the provisions of **Section 6** of the **Civil Procedure Act Cap 21 Laws of Kenya**, the issues raised by the Respondent in **suit No. E002 of 2021** are ‘*sub-judice*’.

12. The Applicant further submits that the Respondents action in filing a separate suit raising the same issues and involving the same parties as a previously instituted suit *runs contra* to the provisions of **section 1A** of the **Civil Procedure Act**.

13. Finally, the applicant submits that the application seeking to have the two suits consolidated is mischievous as it offends the *sub-judice* rule. She urges the court to strike out the Respondents suit with costs.

14. As stated earlier the Preliminary Objection was opposed by the Respondent. The Respondent whilst conceding that the two suits involved the same parties argued that the reliefs sought in the two suits were different, Counsel for the Respondent argued that it would be ‘**draconian**’ to strike out Suit No **E002 of 2021** and submitted that it would be more convenient and efficient to consolidate the two suits.

15. **Section 6** of the **Civil Procedure Act** sets out the principle of *sub-judice* as follows: -

**6. “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.**

16. In the case of **KENYA NATIONAL COMMISSION ON HUMAN RIGHTS – VS – ATTORNEY GENERAL, I.E.B.C., & 16 OTHERS [2020] eKLR**, the Supreme Court of Kenya Stated as follows:-

**“...A party that seeks to invoke the doctrine of res sub-judice must therefore establish that: there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives...”** [Own Emphasis]

17. From the above authorities it is clear that a court would be barred from proceeding with a subsequent suit in which the issues are the same as those raised in a previously instituted suit between the same parties.

18. The two suits **10 of 2019** and **E002 of 2020** undoubtedly involve the same parties. I have perused the orders being sought in the two suits. They both touch on the question of whether or not a marriage exists between the parties and both suits involve a dispute over property allegedly acquired during the subsistence of said marriage. It is evident that both suits raise the same issues.

19. I do agree with the applicants submissions that the Respondent ought to have filed a reply to the Applicants suit **No. 10 of 2019** instead of instituting another suit over the same issues. All that the Respondent has done is to couch the same issues in different terms – which is merely a difference without a distinction.

20. The court is mindful of the fact that the striking out of a suit is considered to be a draconian measure. However, my finding is that suit **No. E002 of 2020** was definitely filed in total disregard of the provisions of **Section 6** of the **Civil Procedure Act**. To entertain the same would unnecessarily stretch the courts meagre resources and time. I find that suit **No. E002 of 2021** is *sub-judice* and the same is struck out in its entirety. Accordingly, the Preliminary Objection succeeds.

21. Given the success of the Preliminary Objection the Respondents Notice of Motion dated **18<sup>th</sup> February 2021** is left with no legs to stand on. It is manifestly clear that the application for consolidation was filed merely to defeat the *sub judice* Rule.

22. In **Republic v Paul Kihara Kariuki, Attorney General & 2 others** Exparte **Law Society of Kenya [2020] eKLR** the Honourable Judge states as follows: -

**“... the issues at hand are crystal clear, namely, whether this suit offends the question of *sub judice* and whether it is an abuse of court process. If the answers are in the affirmative, then consolidation would be impermissible because its application was never meant to cure or cover the doctrine of *sub judice* or abuse of court process. Put differently, a plea for consolidation is not permissible in circumstances whereby it is evident it is being used to evade the wrath of the *sub judice* rule as opposed to serving the settled principles of consolidation”.**

23. Accordingly, the Notice of Motion dated **18<sup>th</sup> February 2019** is dismissed in its entirety. This being a family matter I make no orders on costs.

**DATED IN NAIROBI THIS 29<sup>TH</sup> DAY OF OCTOBER, 2021**

.....

**MAUREEN A. ODERO**

**JUDGE**