



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

MATRIMONIAL PROPERTY CAUSE NO. E005 OF 2021

KM.....PLAINTIFF/APPLICANT

VERSUS

RMM.....DEFENDANT/RESPONDENT

RULING

1. KM, the Plaintiff/Applicant has brought a suit by way of Originating Summons against RMM, her estranged husband. The Plaintiff is seeking declaratory reliefs that the listed properties in the face of the Originating Summons dated 15th July 2020 were jointly acquired and developed by both parties in this suit.

2. This suit was first filed in *High Court in Garissa as Matrimonial cause No. xx of 2020 (Originating Summons)*. The Respondent objected to the jurisdiction of the High Court in Garissa and the Court found that because the grounds raised touched on geographical /administrative jurisdiction of that court, the matter was transferred to this court. The High Court in Garissa in effect dealt majorly with grounds 1 & 2 of the preliminary objection dated 27th July 2020. The objection raised therefore have in respect to ground 3 and 4 of the Preliminary Objection. The grounds raised are t the effect that there is no marriage between the parties herein and that **Section 7 of the matrimonial property Act** can only kick in once a marriage has been dissolved

3. The Respondent has principally submitted that the Originating Summons dated 15th July 2020 is premature and an abuse of court process because the question of existence of marriage and whether there should be a divorce between the parties herein is still a subject of litigation vide *Mwingi PM's Court Divorce Cause No. xx of 2020* between the parties herein.

4. The Respondent has relied on the provision of **Section 7 of Matrimonial Property Act** which provide that division of matrimonial property can only be done once dissolution of marriage is finalized. He further relies on the decisions in **T M W versus F M C [2018] eKLR, EJT – vs-JKL [2019]eKLR and PNN –vs- 2 W N [2017]eKLR** where the courts expressed the opinion that in the absence of divorce or legal separation proceedings the court could not be moved to determine the question of distribution of matrimonial property.

5. The Plaintiff/Applicant has opposed the preliminary objection raised by the Respondent in this suit through submission through Counsel dated 25th June 2021. According to the Plaintiff, the Preliminary Objection raised is an abuse of court process arguing that the points raised are not purely points of law. She relies on the case of *Mukisa Biscuit Manufacturing Co. Ltd –vs-West End Distributors Ltd. (1969) E.A. 696* where the court insisted that a preliminary objection should only consist of purely points of law.

6. The Plaintiff/Applicant submits that the 3rd ground of the Preliminary Objection requires a determination of whether there is a marriage between the parties herein which issue in her view, can only be ascertained after the parties have tendered evidence in trial.

7. She has further submitted that though **Section 7 of the Matrimonial Property Act** states that matrimonial property can only be divided upon dissolution of a marriage, **Section 17** of the same Act gives power to court to make declaration pertaining the rights of each party in respect to matrimonial property. On this score she has relied on the decision in **AKK –vs-PKW [2020]eKLR**.

8. This court has considered the Preliminary Objection raised by the Respondent and the response made. The issue raised is whether the Preliminary Objection raised is proper and well founded in law. A Preliminary Objection is usually a weighty or serious matter to be raised at any stage of proceedings.

A preliminary objection is defined by *Black's Law Dictinonary 10th Edition* as:-

“an objection that, if upheld would render further proceedings before the tribunal impossible or unnecessary. An objection

to the court's jurisdiction is an example of a preliminary objection."

9. The jurisdiction of this court to deal with both criminal and civil matters is unlimited and is donated under **Article 165 (3) (a)** of the **Constitution**. The Respondent has not claimed that this court's jurisdiction is limited because the issues raised fall within **Article 162(2)** and contemplated under **Article 165 (5) of the Constitution**. The Court's jurisdiction to entertain this matter is therefore well grounded and beyond question.

10. Before I consider the nature of the objections raised, it is important to note that a preliminary objection must consist of purely a point of law pleaded which if well-founded will dispose of the entire suit. In the cited case of **Mukisa Biscuit Manufacturing co. Ltd –vs-West End Distributors Ltd (1969) EA** the court held as follows:-

"So far as I am aware, a Preliminary Objection consists of a pure 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 on 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 on arbitration."

11. The same position was experienced in **Hassan Ali Joho & Another Versus Suleiman Said Shabal & 2 Others [2014]eKLR** where the Supreme Court inter alia observed;

"...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."

12. In this matter, the Respondent has pleaded that this court lacks jurisdiction to entertain the Notice of Motion dated 27th July 2020 on the ground that **Section 7 of the Matrimonial Property Act** grants power to this court to divide property only after the dissolution of marriage. The provisions of **Section 7 of the Matrimonial Property Act No. 49, 2013** provides as follows:-

"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."

Section 6(3) of the Act relates to pre-nuptial agreement between spouses and so has no bearing to matters at hand. The import of Section 7 of the Act quite clearly shows that a court can only entertain division of matrimonial property between spouses or vesting of matrimonial property to either spouse upon dissolution of marriage or divorce.

13. It is noted from the proceedings herein that the Plaintiff Applicant apart from declaratory reliefs sought in the mainsuit has also sought interlocutory reliefs through the Notice of Motion dated 5th October 2020 wherein she is seeking injustice or preservative orders on the listed properties which are the subject of the Originating Summons) pending herein.

14. The Lodging of this application by the Plaintiff is in my view significant because by doing so, the Applicant kicked started the operation of **Section 17 of the Matrimonial Property Act** which provides as follows:-

"Action for declaration of rights to property

(1) A person may apply to a court for a 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."

15. The above (**Section 17(2) (C)**) in my view, unclogs the jurisdiction of this court to deal with interlocutory matters touching on declaratory rights to matrimonial property notwithstanding the fact that the marriage between the parties have not been dissolved. The intention of the Law Makers in my view was deliberate and was aimed at preserving the subject mater of the suit or the interest of an estranged spouse, as she or he awaits the process of dissolution of marriage or divorce given the fact that such processes can at times be messy and time consuming.

16. The orders sought in the said Notice of Motion, as observed above, shows that the Applicant is asking this court for injunctive reliefs to restrain the Respondent from trespassing, disposing or evicting her from the properties forming the subject matter of the suit pending determination of the suit, which as I have said, seeks for subdivision of matrimonial property.

17. At this stage this court is not being called upon to determine whether the listed properties constitutes matrimonial property as per the law.

It is also not being asked to divide the said property and to the extent that this court is being called upon to determine the interlocutory application by way of Notice of Motion dated 15th July 2020 and not the main suit, this court has the jurisdiction to entertain the application.

18. The Preliminary Objection filed is mainly hinged on the fact that the divorce proceedings are still pending vide *Mwingi Principal Magistrate's Court Divorce Cause Number xx of 2020*. As I have observed, this court at this stage has not reached the stage of being called upon to entertain subdivision of the matrimonial properties as listed in the suit. In *AKK versus PKW [2020] eKLR* the court of Appeal when faced with a similar situation made the following observation following useful and relevant observations;

“It is also correct that the orders concerning division of matrimonial property pursuant to Section 7 of the Matrimonial Property Act was unavailable to the appellant until the determination of Divorce case 867 of 2017 between the parties hereto. However, in view of the order sought by the appellant extensively detailed above, it cannot categorically be said that the appellant’s prayers fell solely within the ambit of Section 7 of the Act. It is our opinion that the learned Judge erred in limiting the court’s jurisdiction to the provisions in Section 7 of the Act. In failing to address itself to the nature of reliefs sought by the appellant and the enabling provisions under Section 17 of the Act, the trial court did not proceed to determine whether the appellant satisfied the provisions under Section 17 of the Act in order for the court to make the declaratory orders sought.....

An inquiry may thus made under section 17 and declarations may be issued, the subsistence of a marriage notwithstanding. As stated by Lord Morris of Borthy-Guest in *Petit vs. Petit [1970] AC 777*:

One of the main purposes of the act of 1886 was to make it fully possible for the property rights of the parties to a marriage to be kept separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this in my view negates any idea that section 17 was designed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to title to property the question for the court was whose is this? And not to whom shall it be given?.....”

The above case demonstrates that a declaration under Section 17 of the Act is not necessarily pegged on the subsistence of a marriage. The effect of this section is that the court can make a declaration with regard to the suit property even though the parties are still married or pending divorce. It is our considered view that the High Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested. However, by virtue of Section 7, the High court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved. We find that the trial court was clothed with the requisite jurisdiction to entertain those aspects of the appellant’s prayers that did not involve the division of matrimonial property and the superior court was in error to limit its jurisdiction on the basis of the provisions of Section 7 of the Act.”

19. In light of the above decision and clear provisions of Section 17 of the Act, this court finds that the Preliminary Objection dated 27th July, 2020 is unsustainable. The same is over ruled with directions that the application dated 5th October 2020 be fixed for mention for directions on how it shall be canvassed and disposed of. The Costs shall be in cause.

DATED, SIGNED, AND DELIVERED AT KITUI THIS 28TH DAY OF OCTOBER, 2021.

HON. JUSTICE R. K. LIMO

JUDGE