

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL CASE NO. 1 OF 2019 (OS)

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT, NO. 49 OF 2013

AND

IN THE MATTER OF ENFORCEMENT OF RIGHT TO MATRIMONIAL HOME AND MATRIMONIAL PROPERTY

BETWEEN

EWG.....APPLICANT

VERSUS

WMM.....RESPONDENT

RULING

1. In the originating summons filed on 16th January 2019, the applicant EWG pleaded that between 2008 and 2018 she was living together with the respondent WMM as a married couple. During the period, she stated, they jointly acquired property, which were a house, a matrimonial home, a plot and motor vehicles. In the early part of the marriage she was in salaried employment, but later on she left her job to participate in the running of a family business. The marriage became abusive, and she was later ejected from the matrimonial home. She sought a declaration that:-

(a) all these properties and the developments thereon constituted matrimonial property; and

(b) the properties were acquired and developed by the joint and equal funds and efforts of the parties, and that, although registered in the name of the respondent, were held in trust for the applicant and each party had an equal share in them.

The applicant asked that all these properties, and some more that remained undisclosed by the respondent, be sold and the proceeds be shared equally between them.

2. The respondent filed a replying affidavit seeking the dismissal of the summons. He did not deny that the two had lived together between 2008 and 2018. He, however, denied that he was the one who ejected her in 2018. He stated that she had left on her own volition. She had left with valuable household goods, furniture, laptops, printers, cameras and motor vehicle accessories which were –

“part of matrimonial property.”

He stated that the applicant had not described the land properties she was claiming, and therefore he would not respond to the claim. He stated that the vehicles named were his and bought from his finances, and that the applicant had no claim to them. He had inherited property from his father and the applicant had inherited property from her father, he said. He had personally set up the business in question to which the applicant had no claim, he continued. He claimed that the applicant had failed to show that she had contributed to the acquisition and development of the property in question. Lastly, he stated that they were in a –

“trial marriage”

as his parents had not blessed the relationship, and that Kikuyu customary law rites relating to marriage had not been performed.

3. On 4th October 2019 the applicant filed the present motion seeking leave to amend the summons. The grounds were that, at the time of the institution of the suit she did not have the title particulars of the immovable properties claimed in the summons that she has found them and now wished to amend her case to include them; she wished to plead that the marriage between her and the respondent was based on long cohabitation, and therefore would like to rely on presumption of marriage; and that, since she wants not just declaration of her interest in the properties but also the division of the marriage, she sought to have the summons amended to be able to pray for the dissolution of the marriage. Her case was that the proposed amendments are –

“intended to bring before this Honorable Court the accurate and real dispute between the parties herein and to facilitate a final and effectual determination of all matters in dispute between the parties in this suit.”

She pleaded that the proposed amendments will not occasion any prejudice to the respondent.

4. The respondent opposed the application by filing grounds of opposition as follows:-

- (a) the application is fundamentally defective;
- (b) the application is incompetent and a nullity;
- (c) the application is misconceived and bad in law;
- (d) the application is an abuse of the process of the court;
- (e) the proposed amendments seek to introduce a new cause of action; and the proposed amendments oust the jurisdiction of the High Court to hear and determine the summons.

5. The applicant was represented by Mr. Mburu and the respondent by Ms. Nyakundi. I asked each to file written submissions on the application to amend. They each obliged. I have considered what each had to say on the application.

6. Under **Order 8 rules 3 to 5 of the Civil Procedure Rules:**

“3(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

3(2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.

3(3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

3(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

3(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.

4. Amendment of originating process [Order 8, rule 4.] Rule 3 shall have effect in relation to an originating summons, a petition and an originating notice of motion as it has effect in relation to a plaint.

5. General power to amend [Order 8, rule 5.]

(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

(2) This rule shall not have effect in relation to a judgment or order.”

7. These provisions have been the subject of interpretation by the courts in many cases. The principles governing amendment of pleadings have therefore been settled. The purpose of amendments is to facilitate the determination of the real question in controversy between the parties to the proceedings (**Joseph Ochieng & 2 Others T/A Aquiline Agencies –v- First National Bank of Chicago [1995] eKLR**). For this purpose, the court may at any stage order the amendment, either on application or on its own motion. The applicant seeking amendment must be acting in good faith. However late the amendment is sought, it should be allowed provided costs can compensate the other side and no prejudice will be occasioned to the other side. If the proposed amendments introduce a new case or new grounds of defence it can be allowed unless it would change the action into one of substantially different character which could more conveniently be made the subject of a fresh action. The plaintiff will not be allowed to reframe the case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on **Limitation Acts** but subject, however, to powers of court to still allow such an amendment notwithstanding the expiry of current period of limitation. The court may allow an amendment adding or substituting a new cause of action if the same arises out of the same facts or substantially the same facts of the cause of action in respect of which relief has already been claimed in the action by the party applying for leave to seek the amendment.

8. Whether or not an amendment should be granted is a matter for the discretion of the court dealing with matter. The substantial interest should be whether, without prejudicing the other side, the amendment will enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit between the parties. In the exercise of the discretion, the court should remember what was held by the then Court of Appeal in **Eastern Bakery –v- Casterlino [1958] EA 353** that, amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.

9. Lastly, at this interlocutory stage where the applicant is seeking leave to amend her summons, the court should not seek to evaluate the merits of her case, as to do so would anticipate the trial of those merits (**Gianluigi Cernuschi –v- Merry Beach Limited [2019] eKLR**).

10. Applying these principles to the fact so the summons, I consider that the hearing of the matter has not begun. It appears to be common ground that the parties lived together between 2008 and 2018. They were cohabiting. The respondent states that the relationship was no more than a “**trial marriage**”, whereas the applicant states that there was a marriage by long cohabitation. She seeks, through the proposed amendment, that the court decides whether the relationship amounted to a marriage by presumption. It is only when a marriage is established that the next question, whether or not to dissolve it, can be dealt with.

11. The couple has property. It was either acquired during the marriage by them, or was acquired before the marriage by either, or was acquired during the marriage by either party without contribution. This is a matrimonial property cause, and therefore the interest of the applicant and the respondent in each of the properties has to be determined and declared. The court has to declare what property is matrimonial, and what the contribution of each party to its acquisition and development was. Now that amendment is sought to introduce the prayers to dissolve the marriage and to distribute the property, the court is being called upon, through the amendment, to completely and finally determine all the issues relating to the relationship between the applicant and the respondent, now that they ceased to live together in 2018. The issues of presumption of marriage and the dissolution of the marriage may appear to be new causes of action but, in my considered view, do not in any substantial way alter the character of the suit. The amendment seeks to bring before the court, once, all the faces of the relationship between the applicant and the respondent, for the court to consider them and finally settle their dispute.

12. The other complaint by the respondent was that, if there was a marriage between them, **section 2** of the **Marriage Act, 2014** commands that the appropriate court that can handle its dissolution is the Resident Magistrate’s Court, and not the High Court. He is asking that the applicant does file the issues of declaration of the marriage and its dissolution in the Resident Magistrate’s Court, and not here. The applicant is arguing that she came before this court because she wanted the issues of the marriage and matrimonial property to be dealt with together, and that she could not go to the subordinate court because the value of the matrimonial property in question was in excess of Kshs.20 million, and therefore is excess of the monetary jurisdiction of the subordinate court.

13. The practice obtaining is that parties who seek to divorce will file a petition in the subordinate court. If they seek the declaration of their interest in any matrimonial property acquired during the marriage, and subject to the value of the property, they will bring the cause in the High Court. Such declaration is made under **section 17** of the **Matrimonial Property Act, 2013**. It is only upon the dissolution of the marriage that, under **section 7** of the **Matrimonial Property Act**, a cause can be brought for the division of the matrimonial property. In essence, the applicant would be looking at three different suits. One can imagine the time that would be lost, and the costs to be incurred! Parliament should look at **sections 2** of the **Marriage Act** and **Sections 7 and 17** of the **Matrimonial Property Act**, and see how to make it easy, effective and efficient for couples to deal with disputes relating to marriage and matrimonial property. Access to justice, in all its manifestations, is a right under **Article 48** of the Constitution.

14. For the purposes of this application, I consider that, although it is desirable that a party seeking the dissolution of a marriage goes to the subordinate court, this court is under **Article 165(2)(a)** of the Constitution clothed with unlimited original jurisdiction in criminal and civil cases. Under **section 17(2)(b)** of the **Matrimonial Property Act**, an application or a declaration of rights to any property that is contested between spouses may be made as part of a petition in a matrimonial cause. And now that the applicant seeks, as part of her prayers, the selling of the property and the equal sharing of the proceeds of such sale, and therefore bringing herself under **section 7** of the **Matrimonial Property Act**, I consider it appropriate and effectual that all these matters be dealt with in this court.

15. The other reason why amendment was sought was that, at the time of the filing of the summons, the applicant did not have the registration details (the title particulars) of the landed property in dispute; that she has since obtained them. It should be recalled that the respondent questioned the cause, and said he could not appropriately respond to the same, because the title particulars of the property relating to land had not been provided. The amended summons will provide the particulars, and now he will be in a position to respond to them. I find no difficulty in allowing the amendments because the court will provide an opportunity to the respondent to appropriately defend the summons, and therefore no prejudice will be occasioned.

16. In conclusion, I allow the motion dated 4th October 2019 and filed on the same date. The amended originating summons shall be deemed to have been filed and served when the requisite fees is paid, and that payment should be within 7 days from today. The respondent shall be at liberty, within 14 days, to file and serve a response to which the applicant shall have 7 days to respond. The matter shall be mentioned on 30th April 2020 for directions on hearing.

17. The applicant has been indulged. She will pay the costs of the application.

DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 30TH day of APRIL 2020.

A.O. MUCHELULE

JUDGE