



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MATRIMONIAL CAUSE NO. 8 OF 2019

MWK.....APPLICANT

VERSUS

JKK.....RESPONDENT

RULING

1. The undisputed facts of this case are that the Applicant **MWK** and the Respondent, **JKK** are currently engaged in a matrimonial cause being Thika CM's Divorce Cause No.312 of 2018 which was filed by the Applicant. On 25th April 2019 the Applicant filed the instant cause primarily seeking a declaration that certain listed assets are matrimonial properties and an order that the said properties be registered in the joint names of the Applicant and the Respondent. On grounds *inter alia* that the Applicant and Respondent have cohabited as husband and wife since 1996 and that the stated assets were acquired and developed through joint efforts of the parties during the subsistence of the marriage.

2. On 25th September 2019 the Respondent filed a preliminary objection to the effect that the application is premature as the divorce cause in the lower court is yet to be determined so as to pave way for the distribution of the matrimonial property. The Respondent's counsel urged these grounds on 26th September 2019 and asserted that the alleged marriage between the parties is disputed and that divorce cause ought to be determined first.

3. For the Applicant, it was argued that the preliminary objection is misconceived as the instant application does not seek division of the property but a declaration and the preservation of the subject property and that the originating summons is properly before the court.

4. The court has now considered the preliminary objection and the parties' arguments. The first prayer in the originating summons seeks a declaration in respect of the suit properties. However, prayer (3) as drafted has the semblance of a prayer for distribution of the suit properties. As asserted by the Respondent, there is no patent prayer for the preservation of the estate. The Respondent asserts that he will dispute the averment in relation to the existence of a marriage between the parties. While no affidavit material, or pleadings in the lower court divorce court has been proffered by the Respondent, it is self-evident that a declaration of matrimonial property is only possible where parties are current or former spouses.

5. In other words, proof of the subsistence of a marriage during the acquisition of disputed property is a condition precedent to the making of a declaration envisaged under Section 17 of the Matrimonial Property Act. Section 6 of the Act defines matrimonial property in the following terms:

“(1) For the purposes of this Act, matrimonial property means—

(a) the matrimonial home or homes;

(b) household goods and effects in the matrimonial home or homes; or

(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

(2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.

(3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.

(4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.”

6. The Respondent has asserted through his advocate to dispute the existence of a marriage between him and the Applicant. This court would embarrass the trial in the divorce proceedings if it were to proceed to hear the present cause and determine such an issue. It is not clear to me why this application was not filed in the divorce cause as is anticipated in Section 17 (2)(b) of the Matrimonial Property Act. Other than the practice developed and the law applicable during the period when the Married Women Property Act of England (now repealed) applied to Kenya, and subject to pecuniary jurisdiction, there is nothing in the Matrimonial Property Act confining jurisdiction under the Act to the High Court.

7. In my considered view, and for the sake of good order this court ought to decline to entertain the originating summons herein, and instead directs that the same be transferred to the CM's Court at Thika and to be consolidated and canvassed within the divorce cause pending there. The preliminary objection is therefore upheld. Parties will bear own costs.

SIGNED AND DELIVERED ELECTRONICALLY THIS 7TH DAY OF AUGUST 2020

C. MEOLI

JUDGE