



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL SUIT NO.18 OF 2013 (O. S)

FCR.....APPLICANT

- V E R S U S -

CAL.....RESPONDENT

R U L I N G

1. The Respondent herein **CAL** filed a Notice of Preliminary Objection (NOPO) dated 22/10/2019 to the Applicant's Application dated 25/9/2019.

2. The Applicant **FCR** filed this suit by way of Originating Summons (O.S.) seeking declaratory orders against the Respondent in the following terms:-

(i) THAT it be declared that the Applicant and the Respondent were married by virtue of cohabitation for a period of over 20 years.

(ii) THAT a declaration be issued declaring that the following properties were acquired during the subsistence of their union, and that the Applicant's beneficial interest be recognized in light of her contribution towards their acquisition of:-

(a) Five (5) Acres of land comprised in LR.No. Kericho/Boito/[...].

(b) Ten (10) Acres of Land at Burgei within Boito in Bomet County.

(c) Eighteen (18) Acres of Land comprised in Ngata in Nakuru.

3. The Applicant also sought any further relief that this Court may deem fit and just to grant and also costs of the suit.

4. The hearing of the Originating Summons commenced on 4/6/2019 by way of viva voce evidence. After the Applicant had called two witnesses, her lawyer made an oral Application seeking orders that a DNA test be conducted to determine the paternity of the Applicant's five children.

5. The Court directed that a formal Application be filed to enable both parties to canvass the issue adequately.

6. The Applicant filed the Application dated 25/9/2010 but before the same was canvassed, the Respondent raised the preliminary objection dated 22/10/2019 which is coming for consideration in this ruling.

7. The Respondent in the said Notice of Preliminary Objection seeks for Orders that the Application dated 25/9/2019 be struck out and/or dismissed with costs for the following reasons:-

(i) THAT the Application is an affront to the Respondent's right to be heard because it has been brought late in the day since the matter herein was filed in Court on 10/9/2013, a period of six (6) years now.

(ii) THAT the Application is about the paternity of the children which is not an issue in the current case.

(iii) THAT the said Application is seeking to bring an amendment in the pleadings through the backdoor.

(iv) THAT the issue of maintenance is not the subject matter of this suit and therefore the Applicant wants to raise new issues which

are not pleaded.

8. The parties filed written submission in the Notice of Preliminary Objection which I have duly considered. The Respondent submitted that this Court lacks Jurisdiction to determine the application dated 25/9/2019 for reasons that this suit is about matrimonial property and the said Application is about paternity of the children.

9. Further, that this suit and the Application are an abuse of the Court Process because the matter has been dealt with in another Court and determined and the Applicant has come to Court with unclean hands six years after filing of the suit.

10. The Applicant opposed the Notice of Preliminary Objection and submitted that the same does not qualify to be a Preliminary Objection as it does not raise any point of law for interrogation at this stage.

11. The Applicant relied on the case of **MUKISA BISCUIT MANUFACTURING COMPANY LTD. –VS- WESTEND DISTRIBUTORS LTD (1969) E.A. 696** where Sir Charles Newbold P. defined a Preliminary Objection as follows:-

“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”.....

12. The Applicant further submitted that the Application dated 25/9/2019 seeks to advance the Provisions of Section 2 of the Matrimonial Property Act and it is in the interest of Justice that the same be set out for hearing since the Respondent has denied the marriage which led to the birth of the five children namely:-

1. H.K.

2. P.K.

3. R.K.

4. J.K and

5. C.K.

13. I have considered the written submissions filed by the parties and I find that the issues for determination in the Notice of Preliminary Objection are as follows:-

(i) Whether this Court has the Jurisdiction to hear the Application dated 25/9/2019.

(ii) Whether the Notice of Preliminary Objection dated 22/10/2019 raises points of law for interrogation at this stage.

14. On the issue of Jurisdiction, I find that the Application dated 25/9/2019 is seeking to establish the paternity of the Applicant's five children.

15. The Applicant in the Originating summons is seeking declaratory orders in respect of her alleged marriage to the Respondent and matrimonial property she alleges was acquired during her purported marriage.

16. I find that the issue of paternity of the Applicant's five children is not before this Court for determination. The Respondent stated that the said issues have already been determined by another court but did not elaborate.

17. I find that the issues raised in the Notice of Preliminary Objection require to be ascertained by way of evidence either by an Affidavit or Oral testimony.

18. I therefore find that the said issues raised in the Notice of Preliminary Objection are not pure points of law.

19. The Respondent stated in his submissions that the Application dated 25/9/2019 raises issues which have already been determined in another court but he did not elaborate which other court has determined the issues raised in the Notice of Preliminary Objection.

20. In the case of **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696** the Court defined what constitutes Preliminary Objection and the Court of Appeal in **Nitin Properties Ltd v Singh Kalsi & another [1995]eKLR** also stated as follows:

“...A Preliminary Objection 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...”

21. In **Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014]eKLR** the Supreme Court stated as follows;

“...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”.

22. The Supreme Court also considered the position of parties resorting to the use of Preliminary Objections and pronounced itself as follows in the case of **Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others [2015]eKLR;**

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

23. A Preliminary Objection therefore ought to be based on pure points of law and I find that the current Notice of Preliminary Objection does not qualify to be a Preliminary Objection since it was never pleaded and it requires parties to ascertain issues of fact.

24. The Notice of Preliminary Objection dated 22/10/2019 is dismissed with costs to the Respondent.

Delivered, signed and dated at Kericho this 23RD day of October 2020.

A. N. ONGERI

JUDGE