



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 26 OF 2020

SKS T/A SMS.....PLAINTIFF/RESPONDENT

VERSUS

GJB.....1ST DEFENDANT/APPLICANT

KB.....2ND DEFENDANT

RULING

1. The applicants (**GJB and KB**) filed an application dated 6th August 2020 seeking orders that;

- a) The plaintiff's case be dismissed with costs
- b) The costs of this application be borne by the plaintiff in any event.

The application is based on the grounds that;

- a) The suit discloses no reasonable cause of action against the defendants
- b) The suit is scandalous, frivolous and vexatious.
- c) The suit may prejudice, embarrass or delay the fair trial of the action.
- d) The suit is otherwise an abuse of the court process.

APPLICANT'S CASE

2. The applicants in the supporting affidavit confirm that the 1st applicant and the respondent they were once married, but the marriage was dissolved on 6th January 2020. The suit property namely **IR Number xxxxx situate at South East of Eldoret Municipality Uasin Gishu County** registered in the name of the plaintiff/respondent and the 1st defendant/applicant is jointly owned and was jointly acquired, and is for all purposes and intent constituted matrimonial property.

The applicant explains that 2nd defendant has nothing to do with this suit as the animals the respondent mentioned in the pleadings were sold to the 1st defendant and she paid the entire purchase price to him. That he has no proprietary interest in the animals mentioned in the suit.

3. The applicant referred to the defendants' list of documents dated 11th August 2020, being document No. 2 replying affidavit in **Nairobi HCC OS No. 78 of 2019 dated 9th June, 2020 document paragraph 34 reads:**

“THAT the beginning of last year, the plaintiff brought in the farm a large herd of beef animals allegedly bought from a man by the name of KB in Kilifi County.’

This is described as a confirmation that the plaintiff is fully aware the 1st defendant bought the animals.

4. It is argued that it is disingenuous for the plaintiff to allege the animals mentioned herein are owned by the 2nd defendant in this suit without remembering he had pleaded otherwise in OS no. 78 of 2019 dated 9th June 2020. The animals the plaintiff is referring to in the

pleadings are owned by the plaintiff and 1st defendant. They are part of the matrimonial property which is subject to sharing in accordance with the law pursuant to the dissolution of the marriage between the plaintiff and the 1st defendant.

The 1st defendant states that she resides on the suit property with the three issues of the marriage, and it is the only place they know as their ancestral home albeit having been jointly owned and acquired during the subsistence of their marriage.

5. It is pointed out that there is a suit pending in **Nairobi OS 78 of 2019**, where the suit property herein and other properties acquired during the marriage are the subject matter in the suit.

The applicant maintains that the current suit is meant to circumvent and defeat the suit pending before the court in Nairobi (which suit is meant to bring all disputes about the property acquired during the subsistence of the marriage to closure).

That the suit property herein is one of the matrimonial properties which the court will determine how it will be shared between the plaintiff and the 1st defendant. It is pointed out that the plaintiff has omitted to attach a copy of the title to the suit property as it is jointly owned.

6. The suit faulted as being an abuse of the court process and should be dismissed with costs, as it offends **section 7 of the Civil Procedure Act**, and the applicant referred to the case of **Jingo Tours & Safaris Ltd v Jemal Shariff Swaleh & others Mombasa Court of Appeal C.A No. 2 of 2018 and Fernandoh Muriuki v family Bank Limited & Anor Nairobi HCCCC No. E023 of 2019** in support of these submissions.

RESPONDENT'S CASE

7. In a replying affidavit dated 13th August 2020, the respondent deponed that as per the plaint it is clear that there are issues to be determined as the issue of destruction of the plaintiff's dairy farming on the land and co-ownership of the said land thus it cannot be said the suit as filed is beyond redemption. That there is need for the court to interrogate the merit of the plaintiff's assertions to determine whether the defendant has caused the plaintiff loss through her own negligence and ill actions.

The current suit as filed is as a result of the defendants' actions as itemized at paragraph 6 of the plaint which resulted in losses itemized at paragraph 11 and 18 of the plaint which the plaintiff is entitled to and this court has been called upon to ascertain the existence of the said unlawful destruction of the same.

8. That a look at the plaintiff's pleadings point to a clear picture of a suit filed after the continued disturbance by the actions of the defendants and matters having been handled upto the county commander level before proceeding to file the suit and therefore cannot be said to have been filed to either delay or frustrate the purported suit in **Nairobi HCC OS No. 78 of 2019**.

It is contended that going by the allegations by the 1st defendant, if it is true that the land is co-owned then equally the defendant's right to use the said land reciprocates to the plaintiff and thus the defendant cannot destroy farming activities on the said land which belongs to the plaintiff.

9. Further, that this suit has nothing to do with the distribution of the estate after divorce as the 1st defendant states, rather it has to do with damages resulting from the actions of the defendant. It is also pointed out that there is no sale agreement between the defendants for the animals and the 2nd defendant has continued to monitor the animals whilst on the farm contrary to the assertion that the same were sold to the 1st defendant and belong to both the 1st defendant and myself. The claim that the cows belong to her is described as laughable, since the respondent is a serious farmer who would not have allowed close to 200 cows to die.

10. The respondent deponed that he is aware that the 2nd defendant claims ownership of the cows and in fact pays Maasai herdsman who tend to the cows. He is also aware that the issue before the court is not property being shared out or allocated but rather the fact that the defendants have occasioned damage which attracts compensation.

The court is urged to dismiss the application on grounds that it does not disclose any reasonable ground to support the orders sought and the provision of the law is clear that the remedy under **order 2 rule 15** must be resorted to sparingly and only where a pleading cannot be salvaged by an amendment.

ISSUES FOR DETERMINATION

- a) Whether the suit discloses no reasonable cause of action against the defendants

WHETHER THE SUIT DISCLOSES NO REASONABLE CAUSE OF ACTION

11. The plaintiff and the 1st defendant were once married, but divorced on 6th January 2020 following the determination of a divorce cause. Subsequently, the plaintiff filed this suit seeking judgment for loss and damage caused by a large herd of cattle which the 1st defendant brought onto the farm through deceit, and abandoned them there. This resulted in competition over feeds with the plaintiff's animals (which are described as pedigree breeds which were wholly for milk production, and whose productivity was affected by the presence of the new animals. The 1st defendant is also alleged to have ordered the farm workers to allow the new animals to graze on the maize crop which was on the farm, leading to destruction of crop worth over Kshs. 900,000/.

12. It is his contention that he solely developed and invested in the dairy project, and the plaintiff's actions are intended to deprive him of a

source of income. The plaintiff claims damages against the defendant for loss of animals, purchase of hay, loss of fodder production and damage occasioned to the maize plantation. Further, he sought damages for anticipated continuation of loss in milk production, and long term loss. He thus sought damages for the loss of the items set out in the pleadings, as well as a permanent injunction to issue restraining the defendants from interfering with the farm which he owns as it is registered under his name.

13. The defendant urges this court to peruse her list of documents dated 11th August 2020, document 2 (which is the replying affidavit in **Nairobi HCC OS No. 78 of 2019 dated 9th June 2020, particularly paragraph 34 and 35** indicates that the animals were purchased from the 2nd defendant, rendering it probable that the 2nd defendant has no proprietary interest in the animals.

14. The other animals are said to be owned by the plaintiff and the 1st defendant and are part of matrimonial property (indeed they form subject of **Nairobi HCC OS No. 78 of 2019**). **Section 6 of the Matrimonial Property Act** defines matrimonial property act provides;

(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.

15. Whereas the plaintiff has not included the title of the suit property, I however note that the property is not specifically included in the schedule of assets in the list of documents in the matrimonial property cause.

I find it difficult to determine whether the defendant can be held liable for the claims made by the plaintiff when they both have interests in the suit property. It is not disputed that it was acquired during the subsistence of the marriage, and by definition under the **Matrimonial Property Act**, the animals also consist part of the matrimonial property. The plaintiff has not provided any proof that the 2nd defendant claims the animals or monitors them, a mere statement of the same cannot be taken as reasonable proof.

I am of the view that there is no actionable claim as the property is yet to be distributed between the two parties in the matrimonial cause.

16. Given that the property is subject of the matrimonial cause in Nairobi, I am guided by **Section 7 of the Civil Procedure Act**;

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

In the premises, the suit discloses no reasonable cause of action against the defendants and I find that the application is merited. Consequently, this suit be and is hereby dismissed with costs to the respondents.

Delivered and dated this 17th day of November 2020 at Eldoret

H.A. OMONDI

JUDGE

Mr Ondabu for Defendant/Applicant

Mr Songole for Plaintiff/Respondent