



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**HCC NO. 26 OF 2017 (OS)**

**JNK.....APPLICANT**

**VERSUS**

**EMN.....RESPONDENT**

**RULING**

1. On 3<sup>rd</sup> December 2004 the properties Nairobi/Block [particulars withheld] and Nairobi/Block [particulars withheld], each being leasehold property for 99 years from 1<sup>st</sup> February 1981, were registered in the joint names of the applicant JNK. and EMN. On 8<sup>th</sup> January 2013 the applicant filed this cause at the Environment and Land Division of the High Court at Nairobi claiming that between about January 2002 and 9<sup>th</sup> June 2009 the two were living together and cohabiting as husband and wife, and that it was during that time that the properties were jointly acquired and on them their matrimonial home was jointly built. He alleged that on 8<sup>th</sup> June 2009 the respondent hired goons who forcefully evicted him from the properties. The suit was brought for a declaration that these were properties acquired by them during the subsistence of their marriage, and that each party was entitled to 50% share in the same. He sought an order for the sale of the properties and proceeds be shared equally.

2. The respondent filed a defence admitting that the two were between 2002 and 2009 living together but denied that there was a marriage. They were just friends living in a sexual relationship. Her case was that she singularly bought the property, and that it was not during the pendency of any marriage. She denied that the properties constituted matrimonial property, and neither did they constitute a matrimonial home. She denied that the applicant had any claim over the properties which she stated were hers exclusively.

3. On 19<sup>th</sup> April 2017 Mr. Keli for the applicant and Mr. Enonda for the respondent appeared before the Presiding Judge of the Environment and Land Court (Justice Okongo) and informed him that they had agreed that this was a matter for the Family Division of the High Court and not for the Environment and Land Court, and sought its transfer accordingly. The judge obliged then and ordered the transfer of the matter to this court. It should be pointed out that the respondent had in her defence raised issue of jurisdiction. On 3<sup>rd</sup> May 2017 counsel for the parties appeared before this court and agreed on the issues for determination. The issues included the following:-

- (a) whether or not the parties were married;
- (b) whether the suit property was matrimonial property;
- (c) whether the parties were entitled to 50% each of the property;
- (d) etc.

It was agreed that the parties do prepare for the hearing of the cause.

4. On 1<sup>st</sup> November 2018 the applicant filed a motion seeking leave to amend the plaint, that the draft amended plaint annexed to the supporting affidavit be deemed to be duly filed, and, upon granting the two prayers, the court does transfer the suit back to the Environment and Land Court for hearing and disposal. To support the application, the applicant swore that the parties herein were not legally married and that the suit properties were not matrimonial property. That being the case, it was sworn, there dispute belonged to the Environment and Land Court.

5. In response, the respondent filed a notice of preliminary objection to state that the court lacks the jurisdiction to transfer the matter back to

the Environment and Land Court. Reference was made to the fact that the applicant had admitted to the marriage, and had caused the transfer of the cause to this court from the Environment and Land Court.

6. **Order 8 of the Civil Procedure Rules** allows for amendment of pleadings. The hearing of this case has not begun. The general rule is that amendment to pleadings sought before the hearing should be freely allowed if it can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs (**Kenyatta National Hospital –v- Kenya Commercial Bank Ltd & Another [2003 2EA 528]**). The principles under which the court allows amendments are that amendment is intended to determine the true, substantive merits of the case; that amendments should be timeously applied for; that the power to amend can be exercised by the court at any stage of the proceedings; and that, as a general rule, however, late amendment sought should be allowed if made in good faith provided costs can compensate the other side. Lastly the court will not refuse to allow an amendment simply because it introduces a new case (**Kuloba –v- Oduol [2001]KLR 647**). However, there is no power to enable one distinct cause of action neither to be substituted for another nor to change by amending the subject matter of the suit.

7. Under **section 1A of the Civil Procedure Act**, the overriding objective of the **Act** and the **Rules** thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of all disputes governed by the **Act**. A party to civil proceedings, and an advocate for such a party, is under a duty to assist the court to further the overriding objective of the **Act**. Under **section 1B of the Act**, the court shall handle all matters prosecuted before it for the purpose of attaining the following aims:-

- (a) the just determination of the proceedings;
- (b) the efficient disposal of the business of the court; and
- (c) the efficient use of the available judicial and administrative resources.

8. Parties come to court because they have a grievance which they seek to be heard and resolved expeditiously with the minimum expense. It is expected that such grievance is brought in good faith with the single aim of having it resolved efficiently.

9. When the applicant filed this suit before the Environment and Land Division of the High Court on 8<sup>th</sup> January 2013 he pleaded that he and the respondent were husband and wife who had, during the marriage, jointly acquired the properties in question. The respondent denied the alleged marriage. She also denied that the properties constituted marriage property, or that the applicant had participated in their acquisition.

10. The applicant seeks leave to amend his plaint to remove from his pleadings any reference to a marriage, and leave it at them having lived together during the period and having acquired the property jointly. The prayers are sought to be amended to seek a declaration that these were properties jointly bought and jointly owned at 50% each. What is sought is their valuation and sale so that each can get his/her value.

11. I suspect the sought amendment is intended to respond to the defence which raised **sections 6 and 7 of the Matrimonial Property Act (No. 49 of 2013)** under which a spouse cannot seek the division of the matrimonial property unless the marriage has been dissolved.

12. I consider that following the filing of the suit, the respondent was served with summons to enter appearance. She did not enter appearance. The applicant obtained interlocutory judgment and gave evidence in formal proof. The matter was set down for judgment. Before the judgment date, the applicant filed application to set aside the interlocutory judgment and the subsequent formal proof proceedings, to allow her file defence. In her draft defence which she annexed to the application she stated that the applicant was her husband and that the properties formed their matrimonial home, but that she had brought the properties without the applicant's assistance. When she filed a defence after application was allowed by consent she adjusted it to now say that the parties were never married.

13. I appreciate that during the hearing of the case between the two parties all the pleadings and affidavits will be subjected to scrutiny. But I have gone to the great length to show that there is a very little intention on the part of the parties to confront the dispute between them, and have it heard expeditiously and efficiently.

14. This is an old case. The applicant first went to the Environment and Land Court. He realised that was not the forum for the resolution of the matrimonial property dispute. He brought the suit here. Directions were taken for the hearing of the dispute. Parties agreed on the issues for determination. They agreed this was suit to determine matrimonial property. The applicant now wants to be allowed to amend his plaint to allege that infact there was no marriage; that the relationship between the two was the joint purchase of the two pieces of land, which he wants sold and the proceeds shared equally. Given the facts of this case, I determine that the applicant is not acting in good faith in bringing the application. I find that he is engaged in tactics to delay this case, and that what he is doing amounts to an abuse of the process of the court.

15. In reaching this decision, I have considered that before Justice Onyiego on 8<sup>th</sup> October 2018 the applicant intimated that he wished to withdraw the suit to be able to file it in the Environment and Land Court. He was given time to withdraw, but later changed his mind and brought the present application. The applicant still has that option, in which case the present application was not necessary.

16. I dismiss the application dated 1<sup>st</sup> November 2018 with costs. For the reasons given in the foregoing, the objection dated 27<sup>th</sup> November 2018 is sustained with costs.

**DATED and SIGNED at NAIROBI this 22<sup>ND</sup> day of MAY 2019**

**A.O. MUCHELULE**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 29<sup>TH</sup> day of MAY 2019**

**A.N. ONGERI**

**JUDGE**