



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CIVIL CASE NO. 23 OF 2018 (OS).

MWM.....PLAINTIFF

=VERSUS=

EMK.....DEFENDANT

RULING

1. According to the Plaintiff/Applicant herein, the Plaintiff and Defendant are wife and husband respectively having gotten married under the Kamba Customary Law on 1st December, 2008. At the time of the said marriage the Plaintiff had a daughter whom the Defendant took in and adopted as his own child.
2. It was the Plaintiff's case that upon the said marriage, the Plaintiff and the Defendant established a multi-million matrimonial home on Land Parcel No.[...], a land the Defendant acquired before the said marriage. According to the Plaintiff, she has since 2008, fully developed the said parcel of land and greatly enhanced its value by inter alia fencing and cultivating the same and constructing a permanent multi-million home thereon.
3. The Plaintiff however lamented that the Defendant has for some time now, falsely accused her of infidelity and has refused to listen to her pleas of innocence. At a family and clan meeting called by the Defendant on 25th August, 2018, the Defendant offered to pay the Plaintiff Kshs 3,400,000.00 as a consideration for the aforesaid developments and told the Plaintiff to leave the said matrimonial home and go away but the Plaintiff refused.
4. It was deposed that the Defendant has now petitioned for divorce vide Machakos Chief Magistrate's Court Divorce Cause No. 31 of 2018 and has since August, 2018 been threatening the Plaintiff to lock her out of the aforesaid matrimonial home.
5. In this suit the Plaintiff seeks an order that since the said property is a matrimonial property, the same should be shared equally between herself and the defendant and that the matrimonial home ought to be given to her since the Defendant has another home in Kitui Town where he also lives and works.
6. The Plaintiff averred that she is a High School teacher and has for the last ten (10) years taken development loans and used the money to develop the said matrimonial home and property where she has all along lived and still does and wherein she has crops.
7. It was therefore the Plaintiff's case that she stands to suffer irreparably unless the orders sought in this application are granted.
8. In this application therefore the Plaintiff seeks an order that pending the hearing and determination of this suit, an order of injunction issues restraining the Defendant, his agents, servants, contractors and relatives from selling, charging or transferring land parcel no. [...] or in any way interfering with the plaintiff's free access and occupation and use of the said land and matrimonial home.
9. In response to the application, the Defendant raised the following objections:
 - (i) The relief sought in the pleadings filed herein is untenable as this Court lacks jurisdiction to entertain and grant the same.
 - (ii) That there is in existence Machakos Chief Magistrate's Court Divorce Cause No. 31 of 2018 between the same parties which is yet to be determined and/or concluded.

(iii) That it is only the conclusion on merit of the said divorce proceedings and by dint of section 7 of the Matrimonial Property Act that the said matrimonial property can be entertained and which this suit is premised upon.

10. Apart from the said grounds the Defendant swore a replying affidavit in which he deposed that the suit property was purchased by the Defendant's late wife, one **FWM** and the Defendant prior to her death on 16th November, 2003. It was accordingly deposed that the said property was jointly purchased and that even prior to the marriage between the plaintiff and the defendant, the same was registered in the names of the Defendant signifying that the Defendant is the proprietor thereof.

11. It was deposed that as at the time of the marriage between the Plaintiff and the Defendant the Plaintiff already had a daughter who still has her biological father and that at no time has the Defendant ever taken any parental responsibility towards the said child as it has always been the Plaintiff and the child's biological father who have always provided for the said child hence the allegation that the Defendant adopted the said child are baseless.

12. The Defendant insisted that his late wife and himself developed the suit property and lived thereon hence it was their matrimonial property having set up a farm, planted trees and put up buildings. According to the Defendant most of the farm structures and plantation was managed by his late wife and that after her demise, it is the Defendant who has been managing the homestead with the plaintiff showing very little concern, if at all, to the activities in the homestead. The Defendant further denied the allegation that they had built a multi-million matrimonial home on the said parcel of land as a fallacy and averred that the said house is still under construction and is not even near completion. He instituted that it he who has been contributing towards its construction and repairs with very little help from the plaintiff and that it was him who undertook the fencing of the said property and employed a number of farm workers therein with the Plaintiff interfering with the operations thereat.

13. The Defendant therefore averred that the Plaintiff's access to the said property will further interfere with the operations thereat as it will lead to the workers remaining thereat leaving the same prior to its completion. The Defendant contended that he has always let the plaintiff into the suit property under construction and at all times, the plaintiff has always interfered with the construction and workers therein hence enlarging the period for its construction and completion.

14. To the Defendant, this is a town house where he resides while working and that the plaintiff did not contribute anything towards the purchase of the Kitui home where he resides which property the Defendant purchased alone without the plaintiff's involvement.

15. The Defendant however denied that he denied that plaintiff access to the property at any time or threatened to lock her out. To the contrary, it is the plaintiff who has threatened to forcefully evict him from the property, threats which the Defendant has reported to the police. Further, the plaintiff has threatened that his children would suffer after she causes him stress until his death thereby necessitating the filing of the said divorce proceedings which are pending determination. In his view the said proceedings having been filed earlier, it is imperative that they be heard and determined first before dealing with the property.

16. It was therefore averred that in light of the plaintiff's dirty hands, she is undeserving of the equitable relief and that the grant of the orders sought herein will lead to the delay of the completion of the construction due to the likelihood of the plaintiff interfering therewith.

17. In his submissions, the Defendant urged the court to take judicial notice of the fact that the relevant piece of legislation in these proceedings is the **Matrimonial Property Act**, No. 49 of 2013 at Sections 6(1) and 7 thereof.

18. It was therefore submitted that of noteworthy and consideration is the strict emphasis of the statute that the property which can be inferred to be matrimonial property can only be divided as amongst the spouses only and until when they divorce or their marriage is dissolved. The parties to this cause are yet to be divorced and/or separated and/or their marriage dissolved. As such the orders as sought cannot be entertained by this court. In this regard the Defendant referred to **H.K.W vs. N.I.I [2017] eKLR** where the court when faced with a similar scenario as the present one for the declaration and division of matrimonial property, tasked itself first whether the parties' marriage thereto was still subsisting and noted that the parties had already divorced and evidenced through production of a divorce certificate which divorce cause had been undertaken in Divorce Cause No. 108/2012 Milimani Commercial Court. Having satisfied itself on the divorce of the marriage of the parties, the court proceeded to declare and divide the matrimonial property.

19. In this case it was submitted that the plaintiff herein has not adduced and/or produced a divorce cause certificate. Further to this, there is already in existence a Chief Magistrates' Court at Machakos, Divorce Cause Number 31 of 2018 between the same parties herein and which is yet to be determined and/or concluded. The Defendant urged the court to be guided by the case of **PNN vs. ZWN [2017] eKLR** and reiterated that Section 7 of the **Matrimonial Property Act** is a substantive provision of a statute that donates rights and responsibilities to spouses in relation to matrimonial property and that a party invoking the said provision of the law before the dissolution of a marriage is not a procedural technicality but rather a substantive technicality which cannot be cured by the provisions of Articles 22(3)(d) and 159(2)(d) of the Constitution. In this regard the Defendant relied on **N.C.K vs. G.V.K [2015] eKLR**.

20. The Defendant urged this court to be guided by the aforementioned authorities and make a finding in that it does not have the requisite jurisdiction to entertain not only the application dated the 19th February 2018 but also the Originating Summons dated the 18th October 2018 giving rise to this cause.

21. Based on **Kimani Kabogo vs. William Kabogo Gitau [2018] eKLR** and **The Owners of the Motor Vessel 'Lillian S' vs. Caltex Oil (Kenya) Ltd 1989 KLR 1**, it was submitted that this court ought to therefore down its tools in this matter and proceed to strike out the suit with costs to the defendant herein for want of jurisdiction and cause of action.

Determination

22. Since an issue going to the jurisdiction of this Court has been raised that issue must be dealt with *in limine*.

23. In Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1, Nyarangi, JA expressed himself as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

24. Similarly, in Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367 the same Court expressed itself as follows:

“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”

25. Lastly, on the same issue, the Supreme Court in the case of Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011, observed that:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

26. It therefore behoves this Court to consider and determine whether or not it has jurisdiction to entertain the instant proceedings.

27. In this case it is clear this this suit which is commenced by way of originating summons is premised on section 17 of the *Matrimonial Property Act, 2013*. The said section provides as hereunder:

17. (1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.

(2) An application under subsection (1)—

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made as part of a petition in a matrimonial cause; and

(c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.

28. That section in my view deals with properties which are in contest between a husband and a wife. It therefore deals with determinations as to who, as between the wife and the husband, is the true owner of the property in dispute but does not permit the severing of the property unless and until section 7 of the Act comes into play. This section was dealt with by Muchelule, J in N.C.K vs. G.V.K [2015] eKLR, where it was held at paragraphs 12 and 13 that:

“12. In England, under the Matrimonial Causes Act 1973, in instances where parties, for religious or other reasons, do not want to divorce, and if a couple chooses not to bring matrimonial proceedings, the court will resolve any questions about the beneficial entitlement to their property without using the divorce court’s adjustive power. The Family Law Act 1996 at section 33(4) provides for declaratory orders which are intended to do no more than declare the nature of the interest that is claimed. In the case of *Arif v Anwar [2015] EWHC 124 (FAM)* the parties filed divorce proceedings but the same was yet to

be determined. The court proceeded to declare each party's beneficial interest in the matrimonial property without severing the same. Further in *L (Children), RE [2012] EWCA CIV 721* where a married couple were having considerable differences to the point of not being able to cohabit together, the judge issued an occupation order pursuant to section 33 of the Family Law Act 1996 requiring the husband to vacate the matrimonial home forthwith and to remain from it until a certain period, and gave a shared residence order.

13. It would appear to me that a spouse can, under section 17 of the Matrimonial Property Act 2013, either where there is a divorce matter that is pending, or where, for whatever reason, he can no longer live together with the other spouse but is not seeking to divorce, come to court to resolve any questions about the beneficial entitlement to their property. He can seek declaratory orders which are intended to do no more than declare the nature of the interest that is claimed. The court will declare each party's beneficial interest in the matrimonial property without severing the same. Such a declaration is not, in my view, inconsistent with Article 45(3) of the Constitution of Kenya 2010. In other words, both sections 7 and 17 of the Matrimonial Property Act 2013 are consistent with, and seek to reinforce, Article 45(3). One deals with the distribution of matrimonial property upon divorce and the other protects the rights of spouses in relation to matrimonial property where the marriage is still in existence. Once again, the court is not dealing with an application under section 17 of the Matrimonial Property Act 2013."

29. In my view for the court to sever the interest in matrimonial property the provisions of section 6(1) of the *Matrimonial Property Act, 2013* must be adhered to since as was held in *N.C.K vs. G.V.K* (supra):

"I appreciate that under Articles 22(3)(d) and 159(2)(d) of the Constitution of Kenya 2010 there is emphasis that justice should be administered without undue regard to procedural technicalities. However, section 7 of the Matrimonial Property Act 2013 is not a procedural technicality. This is a substantive provision of a statute that donates rights and responsibilities to spouses in relation to matrimonial property."

30. Section 6(1) of the *Matrimonial Property Act, 2013* as follows:

"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.

31. In the event of a dispute touching on matrimonial property, it is my view that the same must be dealt with as provided under section 7 of the said Act which provides that:

Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved. [Emphasis added].

32. It follows that matrimonial property can only be divided upon divorce or dissolution of the marriage. As long as the marriage subsists, none of the spouses can therefore competently move the court for the division of the matrimonial property. This condition is important, in my view in order to protect the family particularly the children since a division of matrimonial property during the pendency of a marriage may lead to the disintegration of the family and may, even though the marriage has not been dissolved, lead to an undesirable situation in which the family no longer subsist as a unit contrary to Article 45(1) of the Constitution which provides that:

The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.

33. It is with a view to protecting the family as the natural and fundamental unit of society that Parliament in its wisdom enacted that the matrimonial property, as opposed to any other spousal property, must remain intact until such time as the marriage is dissolved and the spouses go different ways.

34. It is therefore clear that this court being an organ of the state ought not to purport to do that which is prohibited by the State i.e. entertain a matter geared towards disintegration of the family in a manner otherwise not contemplated by the Constitution and legislation. In the premises I associate myself with the position adopted by the Court in *N.C.K vs. G.V.K [2015] eKLR*, where the court stated as follows:

"Put simply, where a spouse seeks the distribution of matrimonial property he/she has to show that there has been divorce or the dissolution of the marriage. In the instant case the parties are still married, although there is a pending divorce matter between them. Because the application was brought under section 7 of the *Matrimonial Property Act 2013*, I agree with Mr Aduda that the court would not have jurisdiction to entertain the matter. This is because the applicant is seeking the division of matrimonial property during the unbroken coverture...One deals with the distribution of matrimonial property upon divorce and the other protects the rights of spouses in relation to matrimonial property where the marriage is still in existence. Once again, the court is not dealing with an application under section 17 of the *Matrimonial Property Act 2013*. The result is that the preliminary objection taken out by the respondent is sustained. The court does not have jurisdiction under section 7 of the *Matrimonial Property Act 2013* to divide the matrimonial property between the applicant and the respondent during unbroken coverture. The originating summons dated 31st October 2012 is dismissed. This is a

family dispute and therefore ask each party to pay own costs for the summons and the preliminary objection.”

35. In the premises, since the divorce proceedings are still pending and the marriage between the plaintiff and the defendant is yet to be dissolved, these proceedings were prematurely instituted with a view to distributing the matrimonial property. I say so because in prayer 2 of the Originating Summons the Plaintiff herein seeks:

An order that the said land parcel No. Machakos/Konza North Block 1/181 be shared equally between the plaintiff and the defendant, and the plaintiff do retain the aforesaid twelve (12) roomed one (1) storey multi-million matrimonial home which she has constructed on the said land.

36. This prayer, in my view, is not just declaratory in nature but seeks the division of matrimonial property. In view of the subsistence of the marriage between the plaintiff and the defendant, that prayer cannot be granted. It follows that these proceedings are misconceived and the originating summons herein is hereby struck out.

37. In my view the striking out of these proceedings does not render the plaintiff remediless since if properly advised, she may seek an appropriate relief in the Divorce Cause.

38. As the relationship between the parties still exist, at least on paper, there is no need to antagonize them further. In the premises, there will be no order as to costs.

39. It is so ordered.

Read, signed and delivered in open Court at Machakos this 27th day of June, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Musya for the Defendant

CA Geoffrey