



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 18 OF 2015

IN THE MATTER OF AN APPLICATION BY E. J. N. UNDER

SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT, 1882

E. J. N.....APPLICANT

V E R S U S

P. N. N.RESPONDENT

AND

K. M. N.....PROPOSED THIRD PARTY

RULING

1. The applicant E.J. N. and the respondent P.N.N. got married at the District Commissioner's Office in Nandi District on 20th November 1980. The marriage was blessed with three children who include K.M.N. (proposed third party). The marriage was dissolved at the **High Court in Nairobi Divorce Cause No. 92 of 2011** on 30th May 2014.

2. In the Originating Summons dated 24th March 2015 the applicant laid claim to the following property which she stated was acquired during her marriage to the respondent, and that she contributed to that acquisition:-

- i) Bahati/Bahati property Block [particulars withheld] – Nakuru;
- ii) L.R. No. [particulars withheld] North of Njoro Town LR No. [particulars withheld] (Original No. [particulars withheld])
- iii) Langata L.R. No. [particulars withheld] (Plot No. [particulars withheld]);
- iv) Ebony Bar (Title Block [particulars withheld] Kabachia Estate Nakuru);
- v) Motor vehicle Registration number [particulars withheld] ;
- vi) Motor vehicle Registration number [particulars withheld] ;
- vii) and
- viii) all household goods, furniture and fittings in the matrimonial and residential houses.

She sought the settlement of this property.

3. The respondent denied the claim. He stated that Bahati/Bahati property Block [particulars withheld] Nakuru and Langata L.R. No. [particulars withheld] (Plot No. [particulars withheld]) were not his property, but belonged to the proposed third party. He stated that Ebony Bar (Title Block [particulars withheld] Kabachia Estate Nakuru) was property leased from a third party, and later the property as auctioned by the bank. His case was that the applicant never contributed to the acquisition or development of the property. He denied that he owned the vehicles in question. As for the household goods and furniture, he stated that he had single handedly bought them and that, in

any case, they had become worn out, and that he had disposed of them.

4. On 8th August 2017 the applicant filed the present application to amend the Originating Summons so as to enjoin the proposed third party as a third party to the proceedings. She also wanted to include Nairobi Hazina Estate House No. [particulars withheld] as one of the matrimonial properties they had acquired. Her case was that the respondent had fraudulently, illegally, unlawfully and inequitably transferred the matrimonial properties (including Nairobi Hazina Estate House No. [particulars withheld] to the proposed third party, and had sold some of them and used the proceeds to acquire properties which he had registered in the name of the proposed third party. He annexed documents showing that he had transferred L.R. No. [particulars withheld] situate North of Njoro Township in Nakuru to the proposed third party. He also annexed documents of Hazina Estate [particulars withheld] which she alleged he had transferred to the proposed third party. Her case was that these properties were matrimonial properties between her and the respondent.

5. The proposed third party opposed the application. He stated that he did not want to be enjoined in these proceedings between his parents. He stated that he was a pilot who had been working since 25th July 2009, and had in 2012 bought Langata L.R No. [particulars withheld] from L Enterprises Ltd. He got a loan from Standard Chartered Bank to fund the purchase. He produced the sale agreement and the letter of loan acceptance. He disputed that this was matrimonial property between his parents. As for the Hazina Estate house, he stated that the respondent bought and gave it to the children and that he and his brother are holding it in trust for their sister.

6. The respective counsel filed written submissions on the application to amend the Originating Summons and to join the proposed third party. I have considered these.

7. The Court of Appeal in Central Kenya Limited –v- Trust Bank Limited [2002]2 EA 365 stated that:-

“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

8. As a general rule, leave to amend pleadings ought not to be refused unless the court is satisfied that the party applying is acting *mala fide* or that his blunder has caused some injury to the other side which cannot be compensated by the payment of costs or otherwise (Kassam –v- Bank of Baroda (Kenya) Ltd [2002]KLR 294). An amendment ought to be allowed if the real substantial question can be raised between the parties and multiplicity of suits avoided.

9. On the question of joinder of parties, in the case of Andy Forwarders Services Limited & Another –v- Price Waterhouse Coopers Limited & Another [2012]eKLR, it was observed that:-

“A person may be joined in a suit not because there is a cause of action against him, but because that person’s presence is necessary in order to enable the court effectively and completely adjudicate upon and settle all questions involved in the matter.”

10. **Order 1 of the Civil Procedure Rules** provides for joinder of parties. Joinder of parties should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate suits, any common question of law or fact would arise (Lucy Nungari Ngigi & 128 Others –v- National Bank of Kenya Limited & Another [2015]eKLR). A court may even on its own motion add a party to a suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions in the suit.

11. It is notable that the hearing of this case has not begun. The applicant and the respondent were married, and got divorced. The dispute between them is the settlement of matrimonial property. When the applicant named the matrimonial property she left one Hazina Estate house. She wants to amend the Originating Summons to include the property. She then states that the respondent has since transferred some of the matrimonial property to the proposed third party. The respondent denies that the applicant contributed to the requisition of any of the properties in question. His case is that some of the alleged property do in fact belong to the proposed third party. The proposed third party states that some of the property that the applicant states are matrimonial property are in fact his which he bought. There is one property that the applicant claims to be matrimonial property but which is now in the name of the proposed third party and his brother which they hold for their sister. The property was transferred to them by the respondent.

12. This cause will determine whether, as between the applicant and the respondent, any property was acquired and contributed to by either during the subsistence of the marriage; the question whether respondent has transferred any matrimonial property to the proposed third party, or at all; the question whether the proposed third party is holding property that is matrimonial property between his parents; and, as between the applicant and the respondent, the level of contribution to matrimonial property.

13. I consider that the amendment sought to include a property in the Originating Summons will enable the effective and complete resolution of the dispute relating to matrimonial property between the applicant and the respondent. I further consider that the proposed third party’s presence in the cause is necessary to effectively and completely adjudicate upon and settle all questions in the dispute. Parties cannot discuss the properties in his name, and ask the court to make a determination upon those properties, without him being afforded an opportunity to be heard in the matter.

14. Consequently, I allow the application dated 23rd July 2017 for leave to amend the Originating Summons dated 23rd March 2015. The annexed amended Originating Summons shall be deemed to be filed upon the payment of the requisite fees. The respondent and the third party shall have fifteen (15) days to file and serve responses to which the applicant shall respond in seven (7) days.

15. This is a family dispute. Each party shall pay own costs.

DATED and DELIVERED at NAIROBI this 23RD day of JULY, 2019.

A.O. MUCHELULE

JUDGE