



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 17 OF 2016 (O.S)

JSK.....APPLICANT

VERSUS

WKW.....RESPONDENT

RULING

1. The ruling relates to a preliminary objection to an application by way of Originating Summons dated 6th June, 2016 where the applicant sought the following orders;

a) Spent

b) A declaration that the parties herein have equal rights of access, use and enjoyment of the matrimonial property herein more particularly described as Plot No. [xxxx] Mungala (Matrimonial Home) Plot No [xxxx] and [xxxx] Mungala, Plot [xxxx] / Mutituni, Motor Vehicle KBR [xxxx] Toyota Wish and none can sell, dispose or otherwise alienate any of the properties without the consent of the other.

c) A declaration that the applicant do continue to have uninterrupted use of Motor Vehicle KBR [xxxx] Toyota Wish while the respondent to Motor Vehicle KBB [xxxx] Toyota Ipsum as they have been using them before until otherwise mutually agreed by the parties herein.

d) An order of permanent injunction do issue restraining the respondent from restraining the applicant's use of the Motor Vehicle KBR [xxxx] Toyota Wish until otherwise mutually agreed by the parties herein.

e) The costs be borne by the respondent in any event.

2. The objection is dated 30th July, 2019 and raises the following grounds.

a) The parties herein are still married to each other and their marriage has not been dissolved. There cannot be distribution of matrimonial property when the parties are still married.

b) The suit herein offends the provisions of both the constitution of Kenya 2010 and the relevant statute.

c) The suit herein is incompetent, bad in law and is an abuse of this honorable court process.

3. The objection was canvassed vide submissions. Learned counsel for the respondent placed reliance on the case of **NCK v GVK (2015) eKLR** and submitted that the court cannot grant the orders sought because there is a subsisting marriage. Learned counsel for the applicant submitted that the preliminary objection is misconceived and an abuse of the court process and placed reliance on the case of **George Oraro v Barak Eston Mbaja (2005) eKLR** where it was observed that if facts are to be investigated by the court then a preliminary objection cannot dispose of the suit.

4. Having considered the preliminary objection, the issue to be determined is whether the preliminary objection should be allowed. A valid preliminary objection must be on a pure point of law. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the *locus classicus* on preliminary objections in this region, Law JA stated:

So far as I'm aware, 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. Examples are an objection to

the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

5. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.

6. I have reviewed the objection and the thrust of the respondent's objection was that in view of the provisions of **Section 7** of the **Matrimonial Property Act** the suit should not stand. The said section 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.”

7. In my view, what this provision of law entails is that in case of divorce, the court would look at what each party brought to the table for the purposes of the determination of the rights of the parties to such properties if any dispute concerning distribution of matrimonial property arise.

8. In view of the circumstances of the case at hand, there is need to interrogate the evidence on record so as to establish whether or not the marriage between the parties herein is still alive and subsisting as the position of the law is that the suit property herein cannot be subject to distribution without proof of divorce.

9. Having been invited to strike out the suit, I am cognizant of the drastic nature of an order of striking out. In that regard, the wise counsel of Madan JA in **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another[1980] eKLR** ought always to be borne in mind:

As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case, through discovery and oral evidence, it should be used sparingly and cautiously.

10. I have considered the provisions of **Article 159 (2) (d)** of the **Constitution of Kenya** as well as the provisions of **Sections 1A** and **1B** of the **Civil Procedure Act**. The upshot of all these provisions is that while enforcing rules of procedure, the court should not lose sight of the bigger picture: the court's mission to render substantive justice. In **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR (Civil Appeal No. (Application) 228 of 2013) Ouko, JA.** in the majority stated that:

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or which do not occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness...it ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why the Constitution and other statutes that promote substantive justice deliberately use the phrase that justice be done without “undue regard” to procedural technicalities.”

We agree with those sentiments. In this appeal as well, justice should not have been sacrificed at the altar of the procedural requirements, particularly because those lapses did not go to the fundamental dispute that was before the court. This does not mean that procedural rules should be cast aside; it only means that procedural rules should not be elevated to a point where they undermine the cause of justice. ...

The elevation and prominence placed on substantive justice is so critical and pivotal to the extent that Article 159 of the Constitution implies an approach leaning towards substantive determination of disputes upon hearing both sides on evidence. ...

11. There is no suggestion that there was any jurisdictional bar to the suit aside from the issue of the want of a divorce decree which is subject to evidence. It's important to reiterate that a valid preliminary objection should, if successful, dispose of the suit. The preliminary objection in this regard cannot result in a striking out of the suit.

12. In **William Kiprono Towett & 1597 Others v Farmland Aviation Ltd & 2 Others [2016] eKLR** the Court of Appeal stated as follows while dealing with a situation where a preliminary objection on the alleged misjoinder of 1,598 parties to a suit was upheld and the suit struck out:

Whereas the trial court was of the considered opinion that the suit filed before it could not be conveniently tried and determined as filed, the court was at liberty to and should have, in our considered and respectful opinion, either upon the application of any party, or on its own motion ordered separate trials, or made such order as may be expedient. See Order 3 Rule 8 of the Civil Procedure Rules (2010). Given that avenue that was available to it, the trial court's order to strike out the appellant's suit comes into sharp focus. The same was discretionary in the face of the grounds adduced by the respondents and submissions both in

favour and against the issuance of the said order. Thus, strictly speaking the respondent's preliminary objection did not meet the requisite threshold and should not have been allowed. We think that Newbold, J.A. was right to opine that matters discretionary are outside the purview of preliminary objections and while we note Mr. Musangi's contrary view, we respectfully think counsel has it wrong.

13. This court's overall mission is to hear parties and do justice, and the issue raised by the defendant/ respondent could be cured in a manner that allows the parties to have the real dispute between them determined in a just, expeditious and affordable manner. A pragmatic approach in the circumstances would have been to order the parties to file an appropriate application to the requisite court seeking the orders that are lacking, if any. It is noted that the thrust of the preliminary objection relates to the claim that parties herein are still married and hence division of matrimonial property is untenable. However the issue is a matter of fact which has to be proved by way of evidence and as such it ceases to be purely a point of law as envisaged in the **Mukisa Biscuit case (supra)**.

14. In view of the foregoing discourse, I find that the preliminary objection dated 30.7.2019 lacks merit. The same is dismissed. As parties herein are a couple I order each party to bear their own costs. Parties are now directed to proceed to set down the hearing of the originating summons on priority basis.

It is so ordered.

Ruling read, signed and delivered in open court at Machakos this 30th day of October, 2019.

D. K. Kemei

Judge