



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MARIMONIAL CAUSE NO. 63 OF 2019(O.S)

ZSN.....APPLICANT

VERSUS

WNO.....RESPONDENT

RULING

1. On 4th October, 2019 ZSN (hereafter ‘the Applicant’), under Certificate of Urgency, filed a Notice of Motion Application together with an Originating Summons Application both dated 4th October, 2019. In the said Originating Summons Application, she sought a declaration of the Court that Land title no. Ngong/Ngong/[.....] was matrimonial property and the same be distributed equitably between the parties herein.

2. In response to the said originating summons, WNO (hereafter ‘the Respondent’) filed a Notice of Preliminary Objection dated 15th November, 2019 in which he stated *inter alia* that:

i. The applicant has invoked this Honourable Court’s jurisdiction prematurely contrary to the provisions of Section 7 of the Matrimonial Property Act No. 49 of 2013

ii. There is no proper cause herein given that the originating summons creating this matter is fatally defective and incurably wanting in form.

iii. There is no matrimonial property herein as neither the Applicant nor the Respondents are the proprietors of the property the subject of this matter, whether separately or jointly and as such this Honourable Court lacks the jurisdiction to entertain this matter.

3. This Preliminary Objection thus forms the subject matter of this Ruling. The matter proceeded by way of oral submissions where learned counsels for the parties made submissions in support of their respective cases. Mr. Angwenyi learned counsel for the respondent submitted that no matrimonial cause can be filed without the divorce process having been concluded. He confirmed that a divorce cause had indeed been filed but was yet to be heard. He relied on the case of **TMW vs FMC [2018] eKLR** in arguing that the filing of the Originating summons was premature. He also submitted that there was no matrimonial property in dispute and therefore the prayer seeking distribution could not be granted.

4. Mr. Angwenyi submitted that the Originating Summons was not accompanied by a supporting affidavit. Further, that the supporting affidavit that accompanied the Notice of motion that was filed together with the originating summons was not dated contrary to the provisions of the Oaths and statutory declarations Act.

5. In her response, learned counsel for the Applicant M/s Namuige stated that she wished to rely on the supporting affidavit in the Notice of Motion application that accompanied the Originating summons since the grounds were identical. She asserted that the existence of the matrimonial property was clearly set out in the affidavit through an attached sale agreement indicating that both parties had purchased the property in contention. She urged the court to ignore issues of procedural technicalities as raised by the respondent.

6. Having considered the parties’ respective pleadings and submissions as reproduced above, the key issue for determination is whether the Preliminary Objection succeeds. The circumstances in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd [1969] EA 696**, as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

7. The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro -vs- Mbaja (2005)1KLR 141**, the court held

that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd (supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

8. On the first ground, the Respondent alleges that the Originating summons was filed prematurely contrary to the provisions of **Section 7** of the Matrimonial Property Act. **Section 7** of the Matrimonial Property Act 2013, provides for division of matrimonial property upon divorce and /or dissolution of the marriage. It reads as follows:

“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.”

9. The court was informed that there was a petition for divorce filed involving the parties herein. The outcome of the said trial will have a direct impact on the instant matter in Court. The instant matter is the Originating Summons filed on 4th October, 2019 for the declaration of rights and division of matrimonial property. The originating summons was brought under **section 17** of the Matrimonial property Act, which provides as follows;

“(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”

10. **Section 17** of the **Matrimonial Property Act 2013** grants a party the right to file an application before division of matrimonial property proceedings commence. Whilst the application was pending, the Applicant filed a certificate of urgency to restrain the Respondent from evicting her from the alleged matrimonial property. This Court granted interim orders to stop any eviction until the hearing and determination of the Application.

11. This Court has considered the able submissions by Counsel on record for the parties, on the issues raised in the Preliminary Objection. The matter regarding division of matrimonial property ought/shall have the following facets proved by either party:

- a) The fact of a valid ,legal, regular marriage in law;
- b) Dissolution of such marriage by/through of the Court;
- c) That earmarked/listed property constitutes matrimonial property; acquired and developed during subsistence of the marriage;
- d) Contribution by each party to the acquisition/development.

12. The Court concedes that jurisdiction is everything and the Family Court is clothed with relevant/requisite jurisdiction to hear and determine matters regarding division of matrimonial property and hence has jurisdiction to hear and determine the instant matter. However, the hearing shall commence upon proof of Court order on dissolution of marriage. It is not contested by either party that there is a pending Divorce cause in court.

13. In the originating summons, the Applicant relied on **Section 17** of the Matrimonial property Act. However in her prayers, she sought a declaration of rights and distribution of the property alleged to be matrimonial in accordance with **Section 7** of the Matrimonial Property Act. Her prayer for distribution of property is therefore premature. At this particular time, this Court cannot exercise its jurisdiction to hear and determine the application related to the substantive Originating Summons filed on 4th October, 2019 before the divorce proceedings are determined.

14. The third ground raised in the preliminary objection that the property in issue is not matrimonial property is a matter of fact and not law. It therefore fails as a ground to be raised in the preliminary objection.

15. For these reasons, the Preliminary Objection is upheld on the ground that this Court is clothed with jurisdiction to determine the distribution of matrimonial property but it shall be exercised upon dissolution of the marriage between the parties herein.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 19TH DAY OF DECEMBER, 2019.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Advocate for the Applicant

In the presence of.....Advocate for the Respondent.