



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 6 OF 2017 (O.S)

IN THE MATTER OF SECTION 17 OF THE MATRIMONIAL PROPERTY OF 2013

AND

IN THE MATTER OF AN APPLICATION FOR DECLARATION OF PROPERTY RIGHTS

BETWEEN

WINNIE JULIET WAIRIMU MACHARIA.....APPLICANT

VERSUS

PETER GEORGE HEINRICH KOENECKE.....RESPONDENT

RULING

[NOTICE OF PRELIMINARY OBJECTION AMENDED ON 7TH NOVEMBER, 2017]

1. Through the Notice of Preliminary Objection dated 6th November, 2017 and amended on 7th November, 2017, the Respondent, Peter George Heinrich Koenecke prays for the striking out of the Originating Summons and the Notice of Motion filed on 3rd November, 2017 by the Applicant, Winnie Juliet Wairimu Macharia on the following grounds:

“aa) That the Honourable Court lacks requisite jurisdiction to entertain this matter.

a. That clearly there is no cause of action against the Respondent as there is no marriage subsisting between the Petitioner and the Respondent.

b. The Respondent is a legally married person for the last 31 years and accordingly lacks capacity to contract the purported marriage the subject of this petition/suit.

c. Both the suit and the application are based on outright lies and half-truths which are vexatious and an abuse of the court process.

d. The suit and the application are bad in law and are short of any legal basis, only intended to be used as a springboard negotiated settlement in order for the Plaintiff to reach the goal of acquiring the Defendant’s hard earned property.

e. The suit and the Application are based on factual falsehoods, non-disclosure of material facts and intentionally misleading the court to gain uncalled for sympathy to gain mileage to defraud the Defendant.

f. The suit is based on obvious wrong provisions of the law.”

2. The Applicant opposed the Preliminary Objection through the grounds of opposition dated 7th November, 2017 by stating that:

“TAKE NOTICE that the Plaintiff/Applicant shall oppose the Notice of Preliminary Objection by the Defendant/Respondent dated 6th November 2017 on the following grounds: -

“1. THAT the Notice of Preliminary Objection does not disclose any matters of law.

2. THAT the Defendant/Respondent has pleaded facts in the Notice of Preliminary Objection which is unprocedural and erroneous in law.

3. THAT the facts pleaded are one sided and disputed which automatically necessitate investigation to establish the truth and thus cannot be dispensed with preliminarily.

4. THAT the Notice of Preliminary Objection cannot be resolved without considering the merits of the application before the court and thus the same ought to fail in its entirety.

5. THAT under Article 165(3)(a) of the Constitution this Honourable Court has unlimited original jurisdiction to hear both Civil and Criminal matters.

6. THAT both the Constitution and Marriage Act 2014 do recognize customary marriages as valid.

7. THAT Article 45(3) of the Constitution states that parties to the marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”

3. Some background information is necessary in arriving at a determination of the preliminary objection before this court. Through her Originating Summons dated 2nd November, 2017 and filed in court on the same date, the Applicant seeks several declaratory orders. The result of such declarations would be that she and the Respondent are equally entitled to the properties known as Parcel No. 782 Originally No. 520(2) and Portion No. 6803. Her Summons is supported by her affidavit and the grounds on the face of the summons. Those grounds are:

“1) That the Applicant and the Respondent got married in the year 2000 under the Kikuyu Customary Law and are blessed with 3 children namely;

a. Baron Koenecke - 13 years,

b. Troy Koenecke - 10 years

c. Fibi Koenecke - 8 years

2) That the marriage between the Applicant and the Respondent has irretrievably broken down and the Applicant has to fend for herself and the children of the marriage.

3) That the Applicant contributed both directly and indirectly during the subsistence of her marriage to the Respondent in the acquisition, retention and preservation of the properties and/or assets herein.

4) That the Respondent has been using the Police and different lawyers to harass and intimidate the Applicant and their 3 children aged 13 years, 10 years and 8 years to vacate the matrimonial home and a business premises the Applicant has been managing for over 10 years.

5) That the Applicant is entitled to half-shares or such share of all the interest acquired during the pendency of the marriage.

6) That it is the Applicant's contention that the Respondent is likely to sell the said properties and utilize the proceeds thereof for his personal use to her exclusion and their children."

4. In her affidavit the Applicant avers that her marriage to the Respondent has broken down beyond repair due to the Respondent's hostile and violent behavior. It is her averment that they acquired several properties during the seventeen years of their marriage but the Respondent had pointed out and allocated to her the suit properties known as Land Parcel Portion 6803 within Malindi Municipality being the "matrimonial home" and Land Reference Parcel No. 782 originally No. 590(2) being the "business premises." It is also her disposition that she has worked tirelessly to improve these properties. It is the Applicant's case that the Respondent has since acted in a manner to suggest that he may sell or transfer the suit properties to third parties yet she contributed directly or indirectly to the acquisition of the same.

5. At the time of filing her Originating Summons, the Applicant also filed a Notice of Motion seeking that the Respondent be restrained from alienating, wasting, damaging, tampering with or evicting her from the suit premises.

6. With that brief background, I now address the Preliminary Objection. The advocates for the parties agreed to dispose of the matter by way of written submissions.

7. In support of his Preliminary Objection, the Respondent starts by pointing out that his objection falls within the definition of a preliminary objection as per the case of **Mukisa Biscuit Manufacturing Company Ltd v West End distributors Ltd (1969) EA 696** that a preliminary objection raises a pure point of law which if argued disposes of the matter.

8. According to the Respondent, there exists no marriage between him and the Applicant as there is in existence a monogamous marriage between him and one Christiana. In his view, this means that there is no matrimonial property belonging to him and the Applicant.

9. It is the Respondent's submission that even if there indeed exists a marital union between him and the Respondent, the suit properties cannot be termed matrimonial property as he acquired them before the alleged marriage.

10. The Respondent insists that there was no way he could have married the Applicant as he was already in a monogamous marriage with somebody else. He relies on the Marriage Act, 2014 which provides at Section 9(1) that a person in a monogamous marriage shall not contract another marriage.

11. Further, the Respondent asserts that any marriage between him and the Applicant would be voidable by virtue of Section 12 of the Marriage Act as such union has never been registered since the year 2000 being the year of marriage as alleged by the Applicant. Also, that by virtue of Section 11(c) of the Marriage Act, any union between him and the Applicant is not a marriage owing to his ineligibility to marry her due to his subsisting marriage.

12. Another point taken up by the Respondent in support of his objection is the fact that the suit is brought under the Matrimonial Property Act, 2013. Referring to Section 7 of the said Act, the Respondent submits that 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.

13. The Respondent contends that he purchased the properties long before the purported union and the

same cannot be said to be matrimonial property. The Respondent also points out that there is no divorce or ongoing divorce proceedings and the matter before this court is a nullity and an abuse of the court process. It is the Respondent's contention that without a marriage there cannot be any talk about family business. It is on the basis of the cited legal provisions that he urges this court to hold that it has no jurisdiction to hear this matter.

14. The Respondent cited the decisions in the cases of **SMM alias GSM alias SSM v CAK alias CAKM, Civil Appeal No. 2 of 2015** and **Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge & another, Nairobi HCCC No. 330 of 2004** in support of his case. He urges this court to allow his objection and order the Applicant to meet the costs of these proceedings.

15. On her part, the Applicant holds the view that this is not a matter that can be determined through a preliminary objection. She also relies on the case of **Mukisa Biscuit Manufacturing Company Ltd** in support of her assertion that the Respondent's objection does not raise pure points of law but is a general opposition to the suit which can only be determined by hearing the matter on merit. According to her, a preliminary objection can only stand if it raises pure points of law and not general grounds raised to oppose the application on its merit.

16. The Applicant's case is that the amended preliminary objection before this court is not specific and touches on matters of fact which can only be determined after oral evidence has been heard. Citing the decision in the case of **Prof. Nzele David Nzomo v Moses Namayi Anyang and another [2008] eKLR** the Applicant submits that a preliminary objection based on evidence cannot succeed. In the cited case, Joyce Khaminwa, J held that:

“A preliminary objection cannot be supported by evidentiary documents. It would be necessary to place the witness in the witness box to give sworn evidence and be cross-examined on the documents.”

Also cited in support of this proposition is the decision of L.N. Waithaka, J in **Samuel Waweru v Geoffrey Muhoro Mwangi [2013] eKLR**.

17. It is the Applicant's case that the Respondent has taken issue with the validity of their marriage and the only way the issue can be resolved is by hearing the matter. She urges this court to dismiss the Preliminary Objection.

18. A perusal of the pleadings shows that at the conclusion of this matter this court is expected to determine whether there is a marriage between the Applicant and the Respondent and if so, whether during the existence of such a union the two acquired the suit properties. On the strength of the evidence already placed before the court by way of affidavits, the Respondent urges the court to dismiss the Applicant's claim. The fact that a preliminary objection should be based on pure points of law needs no restating. In the case of **Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd (1969) EA 696**, Sir Charles Newbold P. had this to say:

“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.”

In the same case, Law JA, stated that:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection, 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.”

19. The Tanzanian Court of Appeal gave the reason for the utilization of the tool of preliminary objection in **Shahida Abdul Hassanali Kassam v Mahed Mohamed Gulamali Kanji – Civil Application No. 42 of 1999**(unreported) by stating that:

“The aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of an application because there is a point of law that will dispose of the matter summarily.”

20. In a situation where the court has to reconcile the evidence in order to reach a conclusion, one can no longer say that such a preliminary objection is based solely on points of law. An analysis of the evidence comes into play and the facts can only be distilled after the evidence has been adduced.

21. It is indeed a correct statement of the law by the Respondent that the Matrimonial Property Act, 2013 provides for the rights and responsibilities of spouses in relation to matrimonial property. It is also generally correct that there is no room for a polygamous marriage in a monogamous marriage. However, the kind of relationship that exists between the Respondent and the Applicant and the Respondent and third parties can only be determined through evidence.

22. Section 7 of the Matrimonial Property Act does indeed provide that 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. However, the question raised by the Applicant receives protection from Section 17 which states that:

“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.”

23. There is therefore nothing wrong with the Applicant’s request to have the ownership of the suit properties determined even though she has not commenced any proceedings in respect to the alleged marital relationship between her and the Respondent.

24. Having stated the foregoing, it goes without saying that the alleged lack of jurisdiction by this court to handle the matter dissipates and does not require any further comment.

25. In conclusion, I find the preliminary objection without merit. The same is dismissed. Each party shall bear own costs in regard to this preliminary objection.

Dated, signed and delivered at Malindi this 18th day of January, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT