



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HCC NO. 22 OF 2014 (OS)

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

AND

IN THE MATTER OF THE MARRIED WOMEN'S PROPERTY ACT (1882)

J N N.....PETITIONER

VERSUS

P M M.....RESPONDENT

R M M.....INTERESTED PARTY

RULING

1. Vide a notice of motion dated and filed on 4th July 2018 pursuant to Order 2 rule 15 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions of the law, the interested party R M M sought orders that:

(a) Spent.

(b) This honourable court do strike out the amended Originating Summons dated February 2015 with costs.

(c) Costs of the suit.

2. The Application is predicated upon grounds set out on the face of it to the effect that the suit is frivolous, scandalous, and vexatious and does not disclose any reasonable cause of action. It is further supported by an affidavit sworn on 4th July 2018 by the Applicant in which she deponed that she is the lawful wife to the Respondent having celebrated their statutory marriage on 16th July 1983 under Cap 151 of the African Christian Marriage and Divorce Act at St. Stephen's Church Kathangathini. A marriage certificate to prove the existence of the marriage marked annexure RMM-1 was attached. That after contracting the said marriage, they settled and cohabited as husband and wife at Kathangathini area within Makueni County whereof they were blessed with four children namely M M, T M, F M and V M.

3. She further stated that during the subsistence of her marriage to the respondent, they mutually agreed for the Respondent to move to Nairobi where he engaged in transport business. That to her surprise, the year 2017 she stumbled on divorce proceedings documents indicating that he had been married to the Petitioner and that their marriage had been dissolved.

4. She contended that her marriage to the Respondent has never been dissolved and that any purported relationship between the Petitioner and the Respondent in the year 1992 can only qualify to be an adulterous relationship and not a lawful marriage. She therefore urged the court to dismiss the amended Originating Summons seeking division of matrimonial property to which she has a beneficial interest being a wife to the Respondent. She averred that there can never be division of matrimonial property between parties who were not married in the first place. She further urged the court to find that if there was any claim of proprietary interest in the property in question, the same can be ventilated before the Environment and land court or ordinary civil court for declaration of proprietary interest. In a nut shell, she implored the court to find that there is no cause of action.

5. Lastly, the Applicant pleaded with the court to ignore divorce proceedings between the Petitioner and the Respondent before the Chief Magistrate's Court in divorce cause No. 341 of 2009 as there was no marriage legally contracted and capable of dissolution.

6. In response to the application, the Petitioner/Respondent filed grounds of opposition stating that

(1) The petitioner's Originating Summons is properly filed and well founded upon dissolution of the marriage between the Petitioner and the Respondent on 27th April 2012 in the Chief Magistrate's Court Divorce Cause No. 341/2009.

(2) That the Originating Summons is further supported by the Petitioner's affidavit sworn on 31st October 2014 filed on 5th November 2016 (annexure JNN3) being a plaint in respect of Children's Court Civil Suit No. 388 of 2004 between the Petitioner and Respondent in which the Respondent admitted being a father to their two children and his admission in Paragraph 3 and 4 that he was husband to the Petitioner.

(3) That the property in question is registered in the joint names of the Petitioner and Respondent hence cannot be disenfranchised of her rights.

(4) That the amended Originating Summons discloses a cause of action and the application should be dismissed.

7. In response to the Petitioner's response, the Applicant filed a further affidavit stating that she has filed an application before the Chief Magistrate's Court Milimani seeking review of the divorce orders dissolving a non-existent marriage.

8. On 5th July 2018, counsel canvassed the application orally but agreed to file submissions and authorities later. Mr. Kalwa for the Applicant adopted the contents contained in the affidavit in support of the application. Mr. Owino for the Respondent equally reiterated the contents in his grounds of opposition urging the court to dismiss the application. Consequently, the interested party filed her written submissions on 12th July 2018 together with a list of authorities. However the Respondent/Petitioner did not file any submissions.

9. I have considered the application herein, supporting affidavit, grounds of opposition, oral submissions of both counsels and written submissions by the Applicant. The crux of the matter is that the Originating Summons herein is a nonstarter disclosing no cause of action as there was never a marriage between the Petitioner and Respondent capable of dissolution despite existence of a divorce certificate hence division of matrimonial property cannot apply.

10. In his submissions, Mr. Kalwa making reference to Section 3 (1) of Cap 151 opined that, the marriage between the Respondent and the Applicant was monogamous and neither party would contract another marriage without dissolving the first one. Reference was made to the book authored by P.M. Bromley 6th Edition on family law at Page 32. The court was further referred to Page 55 of the said book where the author observed that a marriage contract during the existence of a lawful monogamous marriage is void or voidable. To bolster that position Mr. Kalwa referred the court to the case of **De Reneville vs De Reneville (1948) all ER** where the court held that:

“...a void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never taken place and can be so treated by both parties to it without the necessity of any decree annulling it. A voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction”.

Mr. Kalwa made further reference to the case of **Re Ruenji's (1977) K LR Page 21 , and Ayoob vs Ayoob (1968) EA-72** where similar position was held.

11. Submitting that the marriage between the Petitioner and Respondent was null and void and therefore not curable, counsel referred the court to the case of **Association of Members Episcopal Conference in Eastern Africa (AMECEA) vs Alfred T/A Damoni Architects and 3 others Civil Appeal No. (Application) 22/2001 Nairobi Court of Appeal**. Mr. Kalwa urged the court to consider Section 17 of the Matrimonial Property Act 2013 under which the Originating Summons is brought which basically provides for division of matrimonial property between husband and wife thus referring to the Petitioner as an adulterer and not a wife for purposes of that Section. Counsel further held that the alleged marriage between the Petitioner and Respondent does not pass the litmus test set out in Matrimonial Property Act 2013 which provides for division of matrimonial property between married spouses (**See Tabitha Wangeci Nderitu vs Simon Ndeirtu Kariuki Civil Appeal No. 203/1997**) in which the Court of Appeal stated that a party must prove existence of marriage and that the property in question was acquired during the subsistence of the marriage.

12. According to the applicant (interested party), she is the only legally married wife to the Respondent and that their monogamous marriage celebrated in church under Cap 151 Laws of Kenya has never been dissolved hence the Petitioner had no legal capacity to contract another marriage with the Respondent. It is contended that, it does not matter that the magistrate's court had recognized a marriage between the Petitioner and the Respondent based on the presumption of marriage by virtue of long cohabitation and siring two children.

13. The Petitioner /Respondent did not however file any replying affidavit to challenge the assertion by the Applicant that she is the only legal wife to the Respondent and that she was in possession of a marriage certificate as proof.

14. Having perused the application, affidavit in support and annexures thereof together with submissions by both counsels, the only issue that emerges for determination is whether there is a reasonable cause of action by the Petitioner against the Respondent.

15. The suit before this court is between the Petitioner and Respondent for division of matrimonial property allegedly acquired and registered in their joint names during the subsistence of their marriage. The interested party came in to protect her interest by virtue of being a wife to the Respondent as well. She has not claimed the property in question which is registered in the Petitioner's and Respondent's joint names. The interested party is claiming that the Petitioner has no cause of action. The Respondent (husband) did not file any response to that application. He actually chose to sit at the fence as the "wives" fight.

16. The instant application is brought under Order 2 rule 15 (1) which provides that at any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that it discloses no reasonable cause of action or defence in law, or it is scandalous, frivolous or vexatious or it may prejudice, embarrass or deny the fair trial of the action or it is otherwise an abuse of the court process. What does the phrase cause of action entail? Although there is no standard definition of the phrase, Black's law dictionary 10th Edition defines the phrase as:

“a group of operative facts giving rise to one or more bases for suing a factual situation that entitles one person to obtain a remedy in court – from another person”.

In the case of **D.T. Dobbie vs Muchina (1980) KLR**, the court defined cause of action as a cause of action with some chance of success.

17. It is settled law that authority to strike out a suit for not disclosing reasonable cause of action is purely within the unfettered power or discretion of the court. Such powers must be exercised judicially and or sparingly and only in the outright obvious and hopeless cases which do not necessarily require any evidence to prove or establish thus saving on valuable judicial time (**See D.T. Dobbie vs Muchina (Supra)**).

18. The test applied in ascertaining or determining whether a cause of action is reasonable or not is the probability of success upon consideration of evidence or the allegations in the plaint or Originating Summons as the case may be. According to the Petitioner, she was married to the Respondent a fact that was confirmed in their divorce proceedings and her marriage to the Respondent dissolved vide divorce cause No. 341/09 Milimani Court.

19. The judgment in respect of that divorce cause is still subsisting. The same has not been varied nor set aside on appeal. For all purposes and intents, the Petitioner and Respondent are regarded as former husband and wife. Until the orders made by Milimani law courts being a court of competent jurisdiction on the dissolution of their marriage whether bad or not are set aside, the same are binding.

20. The petitioner's claim is anchored under Section 17(c) of the Matrimonial Property Act No. 49/13 which provides:

Sub-Section (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 former spouse of the person”.

21. A determination having been made by a competent court that the Petitioner and Respondent were once husband and wife, automatically Section 17 of the Matrimonial Property Act comes to play for division of matrimonial property and that is what the Petitioner has done. Doesn't that amount to a reasonable cause of action? Whether the marriage between the Respondent and Petitioner was void as submitted by Mr. Kalwa or not, that is an issue that has already been determined by another court and no appeal has been preferred. I cannot overturn it through the backdoor. The issues being raised here should have been raised before the court that dealt with the divorce proceedings while determining the validity of the marriage in question.

22. For the court to dismiss this suit in which the property in question was acquired and registered by the Petitioner and Respondent in their joint names at this stage will be a kin to unfairly dismissing a litigant from court without affording her/him an opportunity to ventilate her/his case. In the case of **Yaya Towers Ltd vs Trade Bank Ltd (in liquidation) Civil Appeal No. 35/2000**, the court of appeal held that:

“A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and consequently that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial it is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in pleadings was highly improbable, and one, which was difficult to believe, could be proved..... If the defendant assumes heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct mini trials within affidavits”.

23. At this point in time what is material is proof by the Petitioner that she has a reasonable cause of action which has prima facie chances of success. It is not for me to start defining who was married to who and when. Mine is to determine whether the Petitioner and the Respondent were at one point in time married as husband and wife and that there was property acquired during coverture and then determine contribution. The Petitioner has proved through divorce proceedings and the judgment delivered thereof that she was once married to the Respondent and during that period acquired L.R. Nairobi Block 125/788 which is the only property in their joint names. That is a fact that is a reasonable cause of action capable of determination.

24. Having held as above, it is my finding that the application herein is not tenable and the same is struck out with no order as to costs. The matter shall be set down for hearing on merit. Order accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF

SEPTEMBER, 2018.

J.N. ONYIEGO

JUDGE