



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

OS NO. 9 OF 2015 (FORMERLY CIVIL SUIT NO. 66 OF 2014)

L O (alias A O).....PLAINTIFF

VERSUS

O J (alias S J M).....DEFENDANT

RULING

1. **O J alias SJ M** the Defendant herein has by way of a Preliminary Objection dated 14.5.18 objected to the hearing of this suit on grounds that:

1. This Honourable Court lacks jurisdiction to entertain the Plaintiff's suit as it is only the Environment and Land Court that has appropriate jurisdiction to hear and determine disputes touching on the ownership of land as stipulated by Article 165(5)(b) of the Constitution of Kenya, 2010.
2. The said suit and/or Orders are grossly scandalous, vexatious, frivolous and an abuse of this Honourable Court and the due process of law.

2. In the Plaint dated 15.5.14, the Plaintiff **L O alias A O**, seeks:

- a) a declaration that the Suit Property is the Plaintiff's property held in trust by the Defendant for and on behalf of the Plaintiff;
- b) a declaration that the Plaintiff is entitled to the full proceeds of sale in respect of the Suit Property;
- c) An order to direct the Defendant to provide a full statement of account of the proceeds of the sale in respect of the Suit Property and full details of the bank accounts where the said proceeds are deposited;
- d) An order for the payment by the Defendant to the Plaintiff of all sums found to be due from the Defendant to the Plaintiff on the taking of the account under (c) above;
- e) Costs of and incidental to this suit against the Defendant;
- f) Interest (to be assessed), on (d) above at Court rates from the date of filing suit until payment in full; and
- g) Any other or further relief, including all further necessary or appropriate accounts,

Inquiries and directions that this Honourable Court may deem fit to grant.

3. The Plaintiff filed Grounds of Opposition dated 24.5.18 as follows:

- a) That the Defendant submitted to the jurisdiction of this Court when he filed his memorandum of appearance and defence after the matter was transferred to this Court by Kasango, J.
- b) The preliminary objection is ill-timed having been raised 4 years after the suit was instituted and when hearing was slated for 29.5.18.
- c) The Preliminary Objection having been filed on 15.5.18 was calculated to take advantage of the fact that the Plaintiff being

resident in the USA would not be able to send her response before the hearing date and avoid the Defendant appearing for cross examination and consequently seek an adjournment.

d) The suit hinges on the relationship between the parties as husband and wife and thus this Court has jurisdiction to hear and determine the same.

e) The Preliminary Objection is incompetent, made in bad faith and is an abuse of the Court process aimed at delaying the matter further and should be dismissed with costs.

3. The Preliminary Objection was canvassed by way of oral submissions which I have considered.

It was argued that the Defendant cannot raise the issue of jurisdiction of this Court at this stage having submitted to the same in his Defence. Jurisdiction gives the Court authority to deal with a matter before it. The issue of jurisdiction may be raised at any stage of the proceedings. In this regard, I am duly guided by the decision in Stanley Muiruri Muthama v Rishad Hamid Ahmed & 2 others [2018] eKLR where the Court of Appeal stated:

It is trite law that an issue of jurisdiction, as the one that was argued by the 1st respondent's counsel, can be raised at any time, in any manner, and even by the Court itself.

4. The gravamen of the Defendant's Preliminary Objection is that the suit is not a claim for matrimonial property but touches on the use, occupation and title to land which falls within the jurisdiction of the Environment and Land Court by dint of Article 165(5)(b) of the Constitution of Kenya 2010.

5. To determine whether the claim herein relates to matrimonial property or to the use, occupation and title to land, it is necessary to look at the law relating to matrimonial property. The Matrimonial Property Act 2013 is An Act of Parliament to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes. The parties hereto are or were spouses at the time the suit property was acquired. Section 17 of the Act provides:

(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.

6. The Plaintiff avers in her paragraph 3 and 4 of the Plaint that she was at all material times and is still married to the Defendant. The various marriage ceremonies took place in 1998. The Defendant on his part states that the marriage was dissolved in 2005 a fact that is denied by the Plaintiff. The property herein was purchased in 2001 and the transfer registered in the in the name of the Defendant in 2002. The fact of the marriage taking place is not denied nor is the fact of the suit property having been registered in the Defendant's name s in 2002 disputed. The Plaintiff seeks *inter alia*

(a) A declaration that the Suit Property is the Plaintiff's property held in trust by the Defendant for and on behalf of the Plaintiff.

7. The Plaintiff seeks from this Court a **declaration of her rights to the suit property that is contested between her and the Defendant who is her husband (or former husband)**. This is clearly a claim for matrimonial property and the contention that it is not matrimonial property claim is fallacious.

8. It was submitted for the Defendant that the this Court does not have jurisdiction over this matter as it concerns use occupation and title to land which falls within the jurisdiction of the Environment and Land Act. Article 165(5)(b) of the Constitution of Kenya 2010 provides:

(5) The High Court shall not have jurisdiction in respect of matters—

(a) ...

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

9. Article 162(2) of the Constitution provides:

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

10. The Court acknowledges that this dispute touches on land. Article 162(2) of the Constitution has stripped the High Court jurisdiction over disputes relating to use, occupation and title to land. In the instant case however, the Applicant seeks *inter alia* a declaration that having solely provided the funds to purchase the suit property the Defendant holds the same in trust for her.

11. In Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR, the Court of Appeal stated:

In Paramount Bank Limited vs. Vaqvi Syed Qamara & another [2017] eKLR, this Court while discussing the jurisdiction of the Employment and Labour Relations Court over a claim of malicious prosecution expressed itself thus,

“The origin of the dispute between the 1st respondent and the appellant was presented as a dispute arising from an employee/employer relationship, where the appellant accused the 1st respondent of theft followed by a criminal charge of stealing by servant. This was further followed by suspension and finally summary dismissal. There cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general damages for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers under Section 12 of the Employment and Labour Relations Court Act, the court could entertain the dispute in all its aspects and award damages appropriately.”

By parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender.

12. In the instant case, the dominant issue is the matrimonial property dispute and not the use, occupation and title to land. Consequently this Court has jurisdiction to entertain the same.

13. Nyarangi, JA in The Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Ltd, [1989] KLR 1 stated:

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.

14. The Plaint herein was filed in 2014. The Preliminary Objection was raised on 14.5.18 about 4 years later. Although a preliminary objection on jurisdiction of the Court may be raised at any time, parties should endeavor to do so at the earliest opportunity. In my view this a clear case of improper raising of a preliminary objection and has served to unnecessarily delay the matter herein and increase costs. Sir Charles Newbold in the Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd (1969) EA 696 decried the practice of improper raising of preliminary objections thus:

“The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”

15. In the result, I find that the Preliminary Objection lacks merit and the same is hereby dismissed. I direct that the suit be fixed for hearing for the expeditious disposal thereof. Costs shall be in the cause.

DATED, SIGNED and DELIVERED in MOMBASA this 19th day of October 2018

M. THANDE

JUDGE

In the presence of: -

..... **for the Plaintiff**

.....**for the Defendant**

.....**Court Assistant**