



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MATRIMONIAL CAUSE NO. 7 OF 2017 (O.S.)

E M M.....APPLICANT

VERSUS

E E G alias E M.....RESPONDENT

JUDGEMENT

1. The Applicant, E M M, through the notice of motion dated 31st October, 2017 seeks orders as follows:

“a. Spent

b. Spent

c. THAT an interlocutory injunction do issue restraining the Respondent by herself, her employees, officers, servants, agents or by any other person whomsoever acting on her behalf from interfering, alienating, conveying, selling and or transferring and or in any other way interfering or dealing with the property known as [particulars withheld] together with the fitting, furniture and fixtures pending the hearing and determination of this Originating Summons.

d. THAT a mandatory injunction do issue reinstating the Applicant’s access to and vacant possession in the property known as [particulars withheld] together with the fitting, furniture and fixtures pending the hearing and determination of this Originating Summons.

e. THAT costs of the Application be provided for.”

2. In brief, the Applicant’s case is that he was married to the Respondent, E E G alias E M, at the Sands at Nomads Hotel in Kwale District on the 25th April, 2013. His evidence is that later he had differences with the Respondent who in the presence of armed police officers, demanded and took away the documents for their house situated on [particulars withheld] and forcefully evicted him from the house. She also detained his personal belongings in house. According to the Applicant, the Respondent intended to sell the property without involving him yet he had the intention of living in the matrimonial home.

3. In her replying affidavit the Respondent avers that she was indeed married to the Applicant but unknown to her the Applicant had a pre-existing marriage contracted between himself and one M M M on 23rd December, 2008. It is her averment that she provided the funds for the purchase of the property in question although the same is jointly registered in their names with the Applicant holding 50% of the property as her trustee. She exhibited a declaration of trust executed in her favour by the Applicant.

4. In a supplementary affidavit dated 17th May, 2018, the Applicant stated that he was never married to one M M M and that no valid marriage certificate had been produced. He averred that he did not deceive the Respondent into marriage. Further, that there is no evidence that the Respondent had single-handedly purchased the property in issue. His averment is that as the property is registered in their joint names the same should be shared equally.

5. At the time of filing the replying affidavit, the Respondent also filed grounds of objection in opposition to both the application and the originating summons. The Respondent stated that the court lacks jurisdiction over the matter as the issue falls into the jurisdiction of the Environment and Land Court. Further, that the Applicant has not complied with the mandatory requirements of Order 5 rules 21, 22 and 25 of the Civil Procedure Rules, 2010 (CPR) hence the court cannot assume jurisdiction over the matter.

6. It is the Respondent’s claim that the case has no chances of success for reasons that there is no valid marriage between the parties as the

Applicant was married to one M M M under the repealed African Christian Marriage and Divorce Act at the time they contracted their marriage. Further, that the prenuptial agreement was influenced by the fraudulent representation by the Applicant that he had the capacity to marry. Also that Section 7 of the Matrimonial Properties Act, 2013 bars division of matrimonial property where the marriage is still in existence.

7. The application was canvassed by way of written submissions. The Applicant submits that the marriage between him and the Respondent was valid and that he had the capacity to contract it. According to him as there is no dissolution of the marriage, the marriage still subsists. He further submits that the marriage certificate annexed to the Respondent's reply alleging that he is married to M M M is fake as it falsifies his details and his purported signature on the same is forged. In addition, it is submitted that there is no proof that the certificate is indeed a copy of the original and the onus lies upon the Respondent to prove that it is a valid document. The Applicant submits that as the property was acquired during the marriage, it is matrimonial property as defined by Section 6(1) of the Matrimonial Property Act, 2013.

8. The Applicant also submits that the Land Registration Act, 2012 provides that once land is registered in the name of a person, the title document confers a good and indefeasible title on that person. The Applicant submits that he contributed to the acquisition of the property in question hence the Respondent does not have exclusive ownership of the same. It is the Applicant's case that he abandoned his job in the United Kingdom to oversee the construction of the matrimonial home on the property they had jointly acquired. He relied on the case of **Yeboah v Yeboah [1974] 2 GLR 114 HC** where it was held that the law regarding joint property entitles a spouse to an interest in it if there was substantial contribution by that spouse to its acquisition during the subsistence of the marriage. He also relies on Section 12 of the Matrimonial Property Act, 2013.

9. The Applicant submits that the registration of the property is proof that he is entitled to the property. He relies on Section 24 of the Land Registration Act and the decision of **Ahmed Ibrahim Suleiman & another v Noor Khamisi Surur [2013] eKLR** and asserts that a registered person acquires absolute ownership of the property and is entitled to the protection of the law. Further, that being one of the registered owners was *prima facie* proof of absolute ownership over the property as per the decision in the case of **Zacharia Onsongo Momanyi v Evans Omurwa Onchangwa [2014] eKLR**. Additionally, the Applicant contends that in the sharing of matrimonial property the maxim of equality is equity applies and matrimonial property ought to be divided equally. He relies on the decision of Waki, JA in **PNN v ZWN [2017] eKLR; Civil Appeal No. 128 of 2014**

10. In opposition to the application, the Respondent submits that this court lacks jurisdiction for the reasons that the Applicant did not seek leave to serve summons outside Kenya. It is the Respondent's case that she is a British citizen and the notice of motion and originating summons shows that she was to be served outside the jurisdiction of this court. The Respondent urges that leave to serve summons outside the jurisdiction of the court is mandatory otherwise the court cannot assume jurisdiction. Reliance is placed on Order 5 Rule 25 of the CPR and the Court of Appeal decision in **Raytheon Aircraft Credit Corporation & another v Air Al-Faraj Limited [2005] 2KLR 47**.

11. It is also urged that this court lacks jurisdiction for the reasons that it is the exclusive jurisdiction of the Environment and Land Court to subdivide property and this court has no jurisdiction as per Articles 162(2)(b) and 165(5)(a) of the Constitution and Section 13 of the Environment and Land Court Act, 2011.

12. The Respondent asserts that the Applicant is not her spouse as he had no capacity to enter into a marriage with her as per sections 9(3), 9(a), 11(1) and 11(2)(c) of the Marriage Act and sections 171 and 172 of the Penal Code. The Respondent relies on the decision of **Re Estate of B.M.R. [1977] eKLR** that held that marriage under the African Christian Marriage and Divorce Act is monogamous. She relies on the decision in **OKN v MPN [2017] eKLR** in support of her assertion that where a party is incompetent to marry, the marriage celebrated is a nullity and the benefits conferred to a lawful marriage do not apply. The Respondent also relies on the decision in **Macfoy v United Africa Co. Ltd [1961] 3All ER** to posit that an act which is void is in law a nullity.

13. It is further submitted that notwithstanding the aforesaid, matrimonial property cannot be divided during subsistence of a marriage hence this court lacks jurisdiction to order division of the property. The Respondent cites Section 7 of the Matrimonial Property Act and the decision of **N.C.K. v G.V.K. [2015] eKLR** in support of this submission. It is further submitted that the Applicant had signed a Declaration of Trust indicating that he was holding his shares in the property in trust for the Respondent and the said shares do not therefore form part of matrimonial property as they are held in trust for her.

14. The Respondent also submits, without prejudice, that the Applicant made no contribution towards the acquisition of the property and as per Section 7(2) of the Matrimonial Property Act he cannot benefit from the same.

15. The questions that call for answers in this application are whether the court has jurisdiction and if so whether the conditions for the grant of the orders sought have been met.

16. It is trite that a court of law cannot explore the issues placed before it by the parties if it has no jurisdiction to do so. As was stated by the Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others [2013] eKLR** a court's jurisdiction flows from either the Constitution or legislation or both and a court of law cannot arrogate itself jurisdiction exceeding that which is conferred upon it by the law.

17. Two issues have been raised on the issue of jurisdiction by the Respondent. The first issue is that this court has no jurisdiction to handle this matter as the same touches on land. The answer to that is that the dispute herein is not about land *per se* but the rights of the parties to matrimonial property. The jurisdiction of this court has not been ousted by the Matrimonial Property Act, 2013. The answer to the Respondent's submission is that I have jurisdiction to handle this matter.

18. The second issue raised on jurisdiction is that the Applicant did not seek the leave of the court, as required by Rule 21 of the CPR, to serve summons on the Respondent who is a foreigner.

19. In support of her submission, the Respondent cited the case of **Raytheon** (supra) where the Court of Appeal held that:

“The High Court assumes jurisdiction over persons outside Kenya by giving leave, on application by a plaintiff to serve summons or notice of summons, as the case may be, outside the country under order V rule 23 and after such summons are served in accordance with the machinery stipulated therein....

The record does not show nor is it contended that the respondent moved the High Court for leave to serve the first appellant outside the jurisdiction and that such leave was given. It follows that at the time the objection to jurisdiction was made, the High Court had not been moved to assume jurisdiction over Raytheon and had not in fact assumed jurisdiction over Raytheon. Thus, there cannot be any question that Raytheon was not amenable to the jurisdiction of the High Court and the objection to jurisdiction should have been allowed on this ground alone.”

20. There is no dispute that the Applicant before this court has not obtained leave to serve his originating summons upon the Respondent. As at this point in time, this court has not assumed jurisdiction over the Respondent.

21. Commenting on the same issue, Aburili, J stated in **Law Society of Kenya v Martin Day & 3 others [2015] eKLR** that:

“The procedure for service of summons on a defendant residing outside Kenya must be followed, inviting the defendants to submit to the jurisdiction of the court. If that is not done, the suit herein shall remain archived against the said defendants forever. That procedure which is explicit in the rules was never followed by the plaintiffs in this case and there is no indication from the reissued summons on record which are in effect invalid for want of leave that there was any such intention to effect service of summons in London as provided for under the rules. I must state that a court of law has never been an archive of pleadings that are not activated.”

22. In bringing the instant application, without first seeking the leave of the court to serve the court papers on the Respondent, the Applicant assumes such leave is granted automatically. This is not correct for Order 5 Rule 25 of the Civil Procedure Rules states in part that **“no such leave shall be granted unless it is made sufficiently to appear to the court that the case is a proper one for service out of Kenya under this Order.”** The grant of leave to serve summons on a defendant out of Kenya is not granted as a matter of course. An application must be made supported by affidavit or other evidence.

23. The Respondent is a British national who, as agreed by the parties, is currently residing in her home country. The rules governing service of summons on a defendant outside Kenya ought to have been complied with in her case before the Applicant could take any further step in the matter.

24. I therefore agree with the Respondent that I have no jurisdiction over her and the consequence is that the instant application is premature. The application fails and the same is dismissed with costs to the Respondent.

Dated, signed and delivered at Malindi this 17th day of December, 2018.

W. KORIR,

THE JUDGE OF THE HIGH COURT