



REPUBLIC OF KENYA
HIGH COURT AT KISUMU
MATRIMONIAL CAUSE NO. 4 OF 2017 (OS)
UNDER
ORDER 37 RULES 1 & 2 OF THE CIVIL PROCEDURE RULES, 2010
AND
IN THE MATTER OF SECTION 7 OF THE MATRIMONIAL PROPERTY ACT, 2013
AND
IN THE MATTER OF THE LAND REGISTRATION ACT, NO. 3 OF 2012
AND
ARTICLE 45(3) & 48 OF THE CONSTITUTION, 2010
AND
THE INHERENT JURISDICTION OF THE HONOURABLE COURT
BETWEEN
M O.....PLAINTIFF
AND
A O W.....DEFENDANT
RULING

This suit was commenced by way of an Originating Summons filed on 7th October, 2015. The plaintiff's claim against the defendant is the following orders:-

- 1. Declaration that the plaintiff, having been and still being lawfully married to the defendant herein, is entitled to and/or obliged to benefit from the Matrimonial Property, which was acquired and/or accumulated by the plaintiff and the defendant respectively during the joint coverture and/or period of marriage**
- 2. Declaration that the plaintiff is entitled to half share of the property acquired during the subsistence of the marriage and/or joint coverture**

3. Declaration that the defendant herein holds LR NO. NORTH SAKWA/NYAWITA/[particulars withheld], the Matrimonial Property, on trust for the plaintiff and an order terminating the trust be issued directing the transfer and registration of the half share of the property to and in favour of the plaintiff

4. Declaration that the plaintiff is entitled to compensation by the defendant towards and on account of any part of LR NO. NORTH SAKWA/NYAWITA/[particulars withheld], the Matrimonial Property, which has been sold, disposed off and/or transferred to Third Parties without the consent and/or participation of the plaintiff

5. In default of compliance and/or failure to execute the transfer, the Deputy Registrar and/or Executive Officer of this Honourable Court be directed and/or ordered to execute all the necessary transfer instruments and all attendant documents, to facilitate the transfer and registration of the half share of the Matrimonial Property in favour of the plaintiff

6. Permanent injunction restraining the defendant either by himself, agents, servants and/or employees from interfering with, trespassing onto and/or dealing with the plaintiff's rights and/or interests over and in respect of various Matrimonial Property which shall have been declared and/or decreed in favor of the plaintiff

7. Costs of the Originating Summons be borne by the defendant

8. Any other orders that the court may deem fit and expedient to grant

The application is based on the ground that the said property was acquired and developed during the subsistence of the marriage with the joint efforts and contributions of the parties, and that it is therefore matrimonial property.

The application is also supported by the plaintiff's affidavit sworn on 7th October 2015 in which she reiterates the grounds on the face of the summons. She avers that she entered into a marital union with the defendant in 1974 as shown by a marriage certificate marked **MO-1** and that they were blessed with 3 issues whose certificates of birth are annexed and marked **MO-2**. She further avers that that LR NO. NORTH SAKWA/NYAWITA/[particulars withheld], the Matrimonial Property, was acquired jointly during the union but was registered in the name of the defendant as shown by a certificate of official search marked **MO-3**. She additionally avers that the couple established their matrimonial home of LR NO. NORTH SAKWA/NYAWITA/[particulars withheld], where she lived until 1984 when they became estranged after the defendant started to cohabit with another woman.

On 23.12.15; defendant filed a notice of motion seeking to strike out the Originating Summons on the ground that orders sought cannot be granted unless the marriage between them is dissolved. In his affidavit sworn on 18.12.15, defendant conceded that he entered into a marital union with the plaintiff in 1974 and that they were blessed with 3 issues. He avers that he bought LR NO. NORTH SAKWA/NYAWITA/[particulars withheld] and that the plaintiff only contributed Kshs. 35,000/-.

In a replying affidavit sworn by the plaintiff on 11.3.16 in response to defendant's affidavit sworn on 7.10.15; plaintiff avers that she and their son paid the purchase price when she realized that the defendant could not pay. That it was agreed that the title deed would be registered in the names of the couple and their son Quincy but it was only in July 2015 that the plaintiff who does not reside in Kenya on a permanent basis realized that the title deed was in the name of the defendant. Plaintiff avers that she had invested over 20 million in building and maintenance of the home as evidenced by various documents and communication evidencing the transfer of money herein marked **MO-1 a-d**.

The parties agreed to dispose of the Originating Summons by way of written submission which they dutifully filed. I have considered the Originating Summons, the Notice of Motion, the affidavits and annexures on record and submissions filed on behalf of the parties and I have summarized the issues for determination as hereunder:-

Issues for determination

- i. Whether LR NO. NORTH SAKWA/NYAWITA/1582 is Matrimonial Property**
- ii. What were the couples 'contribution to its acquisition**
- iii. Whether the plaintiff is entitled to half share of the property acquired during the subsistence of the marriage and/or joint coverture**
- iv. Whether a Declaration should issue that the plaintiff, having been and still being lawfully married to the defendant herein, is entitled to and/or obliged to benefit from the Matrimonial Property**
- v. Protection by way of a permanent injunction of plaintiff's rights and/or interests over and in respect of the Matrimonial Property which shall have been declared and/or decreed in favor of the plaintiff**

I will consider each of the grounds insofar as they relate to the relevant applicable provisions of the Law as set out herein below.

i. Whether LR NO. NORTH SAKWA/NYAWITA/[particulars withheld] is Matrimonial Property

From the affidavits on record, I discern that there is no dispute that LR NO. NORTH SAKWA/NYAWITA/[particulars withheld] is Matrimonial Property.

ii. What was the couples 'contribution to acquisition of the Matrimonial Property

The parties do not dispute that both contributed to the acquisition of the Matrimonial Property. They however do not agree on the extent of each party's contribution.

Contribution is defined by Section 2 of the Act to mean monetary and non-monetary contribution. Non-monetary contribution includes:

- a. Domestic work and management of the matrimonial home;**
- b. Child care;**
- c. Companionship;**
- d. Management of family business or property; and**
- e. Farm work**

The extent of the couples' contribution cannot in my considered view be conclusively be determined by affidavit evidence.

iii. Whether the plaintiff is entitled to half share of the property acquired during the subsistence of the marriage and/or joint coverture

The answer is to be found in Section 7 of the Matrimonial Property Act which provides:-

"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".

Put simply, where a spouse seeks the distribution of matrimonial property he/she has to show that there has been divorce or the dissolution of the marriage. In this case, the marriage between **M** and **A** has virtually come to an end but subsists on paper. The parties are however still married and there is no pending divorce matter between them. I agree with the defendant that under section 7 of the Matrimonial Property Act 2013, the court has no jurisdiction to grant orders of subdivision of matrimonial property during the unbroken coverture.

vi. Whether a Declaration should issue that the plaintiff is entitled to and/or obliged to benefit from the Matrimonial Property

The plaintiff is still lawfully married to the defendant. That is not to say, however, that the plaintiff does not have protection of the law. A combination of the provisions of the **Constitution 2010** and the **Matrimonial Property Act 2013** has settled the law on matrimonial property and charted a clear vision for the future. As relates to marriage, *Article 45 (3)* provides as follows:

“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage”

Section 17 of the *Matrimonial Property Act, 2013* deals with actions for declaration of rights to property and provides that:-

(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.

The provisions of Sections 2, 6, 7 and 17 of the *Matrimonial Property Act, 2013* breathe life into the rights provided in *Article 45 (3)*. The *Matrimonial Property Act* recognizes that parties can come to terms with the reality that they are no longer going to share or enjoy joint ownership of whatever property they may have previously owned and therefore the wisdom in putting their house in order. That is the position in this case.

Having said that, and pending proof of each party's contribution to the acquisition of the Matrimonial property, this court finds that it would be in the interest of justice to protect the plaintiff's interest. I find that the plaintiff has made out a good case for a declaration that she is entitled to and/or obliged to benefit from the Matrimonial Property. The issue relating to compensation by the defendant towards, and on account of any part of LR NO. NORTH SAKWA/NYAWITA/[particulars withheld], which has been sold, disposed of and/or transferred to Third Parties without the consent and/or participation of the plaintiff, can only be determined after parties have tendered further evidence in support thereof.

v. Protection by way of a permanent injunction of plaintiff's rights and/or interests over and in respect of the Matrimonial Property which shall have been declared and/or decreed in favor of the plaintiff

The principles on which the courts will grant an injunction are well known. The Court of Appeal restated those principles in *Nguruman Limited V. Jan Bonde Nielsen & 2 Others, CA NO. 77 OF 2012*, together with the mode of their application as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements

to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) in case of any doubts as to (b) show that the balance of convenience is in his favour.

A permanent injunction is typically issued once a lawsuit over the underlying activity is resolved, as distinguished from a preliminary injunction, which is issued while the lawsuit is pending. As stated hereinabove, *the extent of the couples' contribution is yet to be determined.*

That is not to say, however, that the plaintiff's right cannot be protected. Section 3A provides that:-

"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".

It would be an exercise in futility to declare a right and not protect it. Since Court orders are not made in vain, it would be in the interest of justice to preserve the matrimonial property, by a temporary injunction, pending determination of each party's contribution. It was appreciated by **Ojwang, J** (as he then was) in **B vs. Attorney General [2004] 1 KLR 431** that:

"The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.

I am of the considered view that the plaintiff has established a *prima facie* case with a probability of success. I am also convinced that damages may not be adequate remedy to compensate her in the event that she loses her right over the matrimonial property. From the above exposition, I find that the balance of convenience tilts in favour of the plaintiff.

In the end, Originating Summons filed on 7th October, 2015 is allowed in the following terms:

i. A declaration be and is hereby issued that LR NO. NORTH SAKWA/NYAWITA/[particulars withheld] is Matrimonial Property

ii. A declaration be and is hereby issued that the plaintiff, having been and still being lawfully married to the defendant herein, is entitled to and/or obliged to benefit from the Matrimonial Property

iii. That pending determination of the couples' contribution to the acquisition of the Matrimonial Property, and determination of whether or not plaintiff is entitled to compensation on account of any part of LR NO. NORTH SAKWA/NYAWITA/[particulars withheld], which has been sold, disposed off and/or transferred to Third Parties without the consent and/or participation of the plaintiff, a temporary injunction be and is hereby issued restraining the defendant either by himself, agents, servants and/or employees from interfering with, and/or dealing with the matrimonial property in any manner that may adversely affect the rights and/or interests over and in respect thereof which have and which may, upon the conclusion of this case, be declared in favor of the plaintiff

iv. Costs shall be in the cause

DATED AND DELIVERED THIS 22ND DAY OF JUNE 2017

T.W.CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - FELIX

Plaintiff - N/A

Defendant - N/A