



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 53 OF 2013 (OS)**

**GNK.....PLAINTIFF**

**VERSUS**

**SKM.....DEFENDANT**

**RULING**

1. The Originating Summons dated 10<sup>th</sup> July 2013 was lodged herein by the plaintiff on 3<sup>rd</sup> September 2013. In it she seeks several declarations relating to Karai/[Particulars Withheld] and [Particulars Withheld], Karai/[Particulars Withheld] and assorted household goods. She would like the court to hold that the said assets were acquired during the coverture of herself with the defendant, and to declare that she is entitled to a 50% share thereof. She has sworn a detailed affidavit setting out her contribution to the acquisition and development of the assets.

2. The matter for determination is the interlocutory application dated 1<sup>st</sup> October 2014. In that application the plaintiff seeks several orders. He would like Karai/[Particulars Withheld] and [Particulars Withheld], Karai/[Particulars Withheld] preserved pending determination of the Originating Summons, deposit of the rental income from Karai/ [Particulars Withheld] in a joint account in the names of the advocates for the parties herein pending determination of the suit or further orders of the court, deposit in court of title deeds in respect of the three properties and leave to amend the Originating Summons.

3. In the affidavit sworn in support of the interlocutory application, the plaintiff pleads that that their marriage has broken down irretrievably, and that there are pending proceedings for separation and maintenance, wherein there are pending orders of maintenance where the defendant is required to make a monthly payment to the plaintiff. She pleads that the defendant had caused a caveat that she had placed on Karai/[Particulars Withheld] to be removed and to have the property subdivided into Karai/[Particulars Withheld] and [Particulars Withheld], and the subplots transferred to third parties. On Karai/[Particulars Withheld] stands rental house, and was transferred to the defendant's other wife, SWK; while Karai/[Particulars Withheld] is vacant and was transferred to a Moses Ndarwa. She fears that the defendant may take steps to have the other parcels transferred to other persons so as to defat her claim.

4. In the same application, the plaintiff seeks to amend the Originating Summons to address two issues arising from the subdivision of Karai/[Particulars Withheld] into Karai/[Particulars Withheld] and [Particulars Withheld]. One, one of the subdivisions is income generating and has been transferred to the plaintiff's co-wife, and the plaintiff is likely to lose her interest in that property and she is losing income. She would like her co-wife joined into the cause, and secondly to have orders made on the preservation of the income generated.

5. The application is opposed by the defendant. He swore an affidavit on 23<sup>rd</sup> October 2014. He denies the alleged marriage between him and the plaintiff, and thereof the suit and the application were misconceived. He states that Karai/[Particulars Withheld] is ancestral property, which is not registered in his name, and therefore it ought not to be subject to the suit. He avers that Karai/[Particulars Withheld] was acquired after the separation of the parties and therefore he could not have contributed to its acquisition. He submits that the prayer for deposit of the title documents was therefore untenable.

6. Directions were given on 3<sup>rd</sup> November 2016 for disposal of the application by way of written submissions. Both sides have filed their respective written submissions. I have had time to peruse through

the same and noted the arguments made therein.

7. The suit herein is for preservation of the assets the subject of the suit for division thereof. In such suits, the preliminary issue to be resolved first is as to whether the parties were married before orders can be made for preservation of the suit property. An owner of property ought not to be prejudiced in his rights unless there is *prima facie* evidence of a marriage.

8. It is alleged in this matter that the parties had contracted a customary law marriage sometime in 1975. The defendant has contested the claim that there was such a marriage. Whether the parties were married has therefore become a moot point for determination at the main hearing. Before grant of orders for preservation of the assets can be made, it would be incumbent on the on the plaintiff to place before the court some evidence to establish *prima facie* existence of the alleged marriage. An affidavit of marriage or some other documented piece of evidence would have sufficed. Alternatively, the plaintiff should have sought to have the application disposed of by oral evidence which would have given her opportunity to prove the customary law marriage between her and the defendant.

9. It would appear to me that the marriage is still subsisting. The parties are separated, and there are pending proceedings for separation and maintenance. The marriage is no doubt intact, and there are no efforts to have it dissolved or terminated. It is a matter of law and policy that property in such circumstances ought not to be severed. However, the suit before me is not for severance of the property, but for declaration of rights of the parties with respect to the property.

10. In view of what I have stated in paragraph 8 hereabove, I am not satisfied that a *prima facie* case has been made out for grant of the orders sought in the application dated 1<sup>st</sup> October 2014 in prayers 3, 4 and 5 thereof, and I shall accordingly dismiss it. I shall however allow prayers 6 and 7 of the application. Costs shall be in the cause. The suit herein relates to property situate within Kiambu County, I shall accordingly order that the suit be transferred to the High Court of Kenya at Kiambu for final disposal.

**DATED, SIGNED and DELIVERED at NAIROBI this 29<sup>TH</sup> DAY OF SEPTEMBER, 2017**

**W. MUSYOKA**

**JUDGE**