



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI

MILIMANI LAW COURTS - FAMILY DIVISION

MATRIMONIAL CAUSE NO. 6 OF 2016

MMM APPLICANT

AND

LOO RESPONDENT

RULING

INTRODUCTION

On 29th February, 2016, MMM (hereafter ‘the Respondent’), under Certificate of Urgency, filed a Notice of Motion Application together with an Originating Summons Application both dated 26th February, 2016. In the said Originating Summons Application, she seeks the following orders:

(1) ...

(2) That this Honourable Court be pleased to issue interim order for injunction restraining the Respondent from selling, leasing, mortgaging, charging, transferring the following properties pending the hearing and determination of this suit:

(i) Apartment Ax in Block x of [particulars withheld] Court, Sunrise Park located on L.R No. xxx/11874 Imara Daima.

(ii) Apartment Ax in Block x of [particulars withheld] Court, Sunrise Park located on L.R No. xxx/11874 Imara Daima.

(iii) House in [particulars withheld] Phase I Estate L.R No. xxx/18324 Nairobi.

(iv) The parcel of land in Pioneer Estate, Eldoret.

(v) The parcel of land L.R No. xxxxxx in Amboseli.

(vi) Motor vehicle registration No. Kxx 7xxA, Toyota Surf.

(3) That this Honourable Court be pleased to issue an interim order for injunction restraining the Respondent from evicting the Applicant from Apartment Ax in Block x of [particulars withheld] Court, Sunrise Park, located on L.R No. xxx/11874 Imara Daima, Embakasi Estate.

(4) That this Honourable Court be pleased to direct that the rental proceeds derived from the property known as Apartment Ax in Block x of [particulars withheld] Court, Sunrise Park, located on L.R No. xxx/11874 Imara Daima, Embakasi Estate, be shared equally between the Applicant and the Respondent.

(5) That this Honourable Court be pleased to issue an interim order for injunction restraining the Respondent by himself, his agents, servants or workmen from doing any of the following acts that is to say, demolishing, removing, bringing down, wasting, damaging or in any manner whatsoever destroying any of the houses, buildings, fences and/or structures erected on any of the properties owned jointly by the Applicant and the Respondent pending the hearing and the determination of this suit.

(6) That the costs be paid by the Respondent.

In response to the said Applications, LOO (hereafter 'the Applicant') filed a Notice of Preliminary Objection dated 7th April, 2016 in which he stated *inter alia* that:

(1) The reliefs sought in these proceedings are substantive and far reaching and require precise pleadings by Plaintiff or Petitioner which must raise averments or allegations capable of being denied, traversed or admitted by way of a defense or an answer and the use of the summary process of an Originating Summons shall deny the defendant the opportunity to fully and completely deny, traverse or admit the Plaintiff's claims and this is prejudicial.

(2) These proceedings are incurably incompetent and untenable for the reason that the summary process of using Originating Summons which is specifically provided for under Section 17 of the Married Women Property Act, 1882 of England, a statute of general application, is no longer applicable by reason or repeal by dint of Section 19 of the Matrimonial Property Act No. 49 of 2013.

(3) An Originating Summons can only properly found an action (and a summary one for that matter) as provided for under Order 37 of the Civil Procedure Rules, and such procedure sets forth specific questions, instances and circumstances the Honourable Court may receive and entertain claims and they do not include those contemplated by the Matrimonial Property Act No. 49 of 2013.

This Preliminary Objection thus forms the subject matter of this Ruling.

THE APPLICANT'S CASE

In his Written Submissions dated 22nd April, 2016, the Applicant submitted that following the enactment of **Section 19** of the **Matrimonial Property Act**, the entire **Married Women Property Act, 1882**, together with procedures provided therein, ceased to extend to or apply in Kenya.

That an examination of **Section 7** of the **Matrimonial Property Act** indicates that in a claim to matrimonial property, the claimant spouse must prove contribution towards its acquisition and hence, in proceedings under the Section, the claimant is by law required to prove or establish his/her contribution to the acquisition of the property and that it is no longer enough for a Party to merely allege that he/she was married and therefore he/she is entitled to the property.

In the Applicant's view, given that the procedure to apply to Court is not expressly set out in the **Matrimonial Property Act**, and the **Rules** specifying the procedure for such an Application are yet to be established, it follows that a person who moves the Court must do so through a Plaintiff. In that regard, it was his contention that the Plaintiff must specifically aver that the contribution to a specific asset was made by him/her in the manner pleaded and particularized.

It was his assertion that civil claims are, by virtue of the **Civil Procedure Act** and **Rules**, generally instituted by Plaintiff and in proceedings where proof by oral evidence is necessary, the Plaintiff is the ideal procedure to use. That the use of an Originating Summons is allowed, but limited to determine the specific questions which are contemplated under **Order 37** of the **Civil Procedure Rules** and as such, a claim under the **Matrimonial Property Act** is not one of the instances provided for under the said **Order**.

The Applicant submitted that he shall be prejudiced if the Respondent is allowed to proceed by way of an Originating Summons and the ends of justice will only be served when she files her claim by plaintiff. In that regard, he relied on the writing, namely, **N.S Bindra's Pleadings and Practice 10th Edition, Universal Law Publishing Co. Pvt Ltd New Delhi** in support of his arguments and added further that, the use of an Originating Summons offends the provisions of the **Matrimonial Property Act** and the **Civil Procedure Act** and **Rules** and as such, the Originating Summons herein be struck out with costs.

THE RESPONSE

The Respondent opposed the Preliminary Objection and filed Written Submissions dated 18th May, 2016. She contended that she filed the Originating Summons Application pursuant to **Sections 7, 14** and **17** of the **Matrimonial Property Act**. Further, that the same is within **Order 37** of the **Civil Procedure Rules**. In that regard, she relied on the definition of the term '*cestui que trust*' as proffered in **Black's Law Dictionary, 2nd Edition**, and maintained that being a *cestui que trust* by virtue of her rights being vested in the Applicant, the Application is well within **Order 37 (1) (a)** and **(g)**.

It was her contention that although **Section 17** of the **Matrimonial Property Act** states that an Applicant is to make such Applications to Court in accordance with the procedures as prescribed, the Act has not expressly given any procedure to that effect and as such, the Kenyan Courts have adopted the use of Originating Summons for instance, in the cases of **REGINE BUTT VS HAROON BUTT AND ANOTHER, MOMBASA, CAUSE NO. 8 OF 2014** and **J.R.K.N VS R.G.N, NAIROBI CAUSE NO. 49 OF 2007**,

According to the Respondent, it is not in order to ask the Court to strike out the Originating Summons and the Court ought to be guided by the legal principle that Courts will not strike out a suit summarily unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and that it is so weak as to be beyond redemption. Further, that in the instant case, without an Affidavit in reply, the Applicant's objection is an abuse of the Court process.

The Respondent further took the view that the Court ought to be guided by **Articles 159 (2) (d)** of the **Constitution**, **Section 1A** and **1B** of the **Civil Procedure Act** and **Order 2 Rule 14** and **Order 37** of the **Civil Procedure Rules**. Furthermore, the Respondent argued that in any event, the High Court on 3rd November, 2014, dismissed a similar objection and allowed a case to proceed by way of Originating Summons, notwithstanding, it had been commenced under the repealed **Married Women's Property Act**.

While relying on **MUKISA BISCUITS MANUFACTURING CO. LTD VS WESTEND DISTRIBUTORS LTD (1969) EA 696** it was the Respondent's other submission that the instant Preliminary Objection does not pass the test of a Preliminary Objection as outlined therein and the same is misconceived and is only meant to delay the suit and hence ought to be dismissed with costs.

DETERMINATION

The question that falls for determination is whether the Preliminary Objection ought to be upheld. On that note, it should not be lost that a Preliminary Objection must be purely founded on a point of law. A Preliminary Objection was defined in the case of **MUKISA BISCUIT COMPANY VS WESTEND DISTRIBUTORS LIMITED (SUPRA)** where it was noted that:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and occasion confuse the issues. This improper practice should stop.”

In the present case, the Court is satisfied that the present Preliminary Objection is founded on the law as it challenges the validity of the present proceedings on the basis that it has been brought under the wrong statutory instrument. At the core of the Applicant's case is that these proceedings are fundamentally defective for being brought through an Originating Summon.

The question then that the Court must answer is whether the institution of these proceedings through an Originating Summon renders the same defective. In that regard, **Order 37** of the **Civil Procedure Rules** outlines the circumstances through which suits may be instituted through Originating Summons. As pertaining to matrimonial causes, as the present matter, the substantive law is the **Matrimonial Property Act** which under **Section 17** 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 Court notes, and as also pointed out by both Parties, that the **Matrimonial Property Act** does not give the procedure or the mode of institution of any such proceedings under the Act and the same has thus been left to the parties and the Courts. It follows therefore that there is no explicitly outlined procedure to be followed in instituting proceedings under the Act and hence, this Court cannot dismiss a litigant on the basis that he or she ought to have instituted such proceedings using a particular mode as opposed to another.

In the present case, the Court notes that the Applicant's apprehension is that he shall be denied the opportunity to fully and completely traverse or admit the claims raised in the Respondent's Originating Summon. In that regard, I must out rightly dismiss those assertions. I hold so because, this Court is under a duty to hear and determine disputes between Parties and by considering their respective cases. That goes in line with the right to access justice as guaranteed under **Article 48** of the **Constitution**.

Furthermore, **Article 27 (1)** of the **Constitution** guarantees every person the right to equal treatment before the law and grants the right to equal protection and benefit of the law. The same ought to be read together with **Article 50 (1)** of the **Constitution** which provides that:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

The foregoing constitutional guarantees have been enacted to ensure that litigants have a right to be heard and have their respective cases heard and determined. The mere fact that the present proceedings have been instituted through Originating Summons does not mean that this Court will lock out the Respondent from the proceedings and not accord him a right to reply to any allegations made therein. This Court is under a duty to hear each Party's side of the story and take evidence in order to conclusively determine any contentious matters arising. In the absence of any procedure under the **Matrimonial Property Act** for the institution of proceedings such as the present one, the Court cannot fault the Respondent for instituting the present proceedings by way of Originating Summons.

The above findings notwithstanding, it should not be lost that **Article 159 (2) (d)** of the **Constitution** mandates this Court to administer justice without undue regard to procedural technicalities and as such, the Preliminary Objection must be overruled. It will be absurd for this Court to penalize the Respondent and to order that she institutes the present proceedings through other means which are not explicitly stipulated under the **Matrimonial Property Act**.

DISPOSITION

Based on the above reasoning, I am inclined to overrule the Notice of Preliminary Objection dated 7th April, 2016.

Let each Party bear its own costs to the present Application.

DATED AT NAIROBI THIS 31st DAY OF OCTOBER, 2016

M. W. MUIGAI

JUDGE

In presence of:-