REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL CASE NO. 5 OF 2016(OS)

M W K.....PLAINTIFF/APPLICANT

VERSUS

AM W…….……RESPONDENT

RULING ON PRELIMINARY OBJECTION

A. INTRODUCTION

1. The Plaintiff took out an Originating Summons on 17/09/2015 at the High Court in Muranga seeking certain declarations and reliefs based, primarily, on the Matrimonial Property Act. The main relief sought is a declaration that the property known as LR [Particulars Withheld] Block 1/1557 is matrimonial property between the Applicant and Respondent, and that, therefore, the Applicant is entitled to 50% ownership of the property.

2. The Respondent responded by filing, through his lawyers, J. Makumi & Co. Advocates, a Notice of Preliminary Objection dated 15/03/2016. The Preliminary Objection is to the effect that the Originating Summons is "misconceived, frivolous, totally devoid of merit and mala fides for the reason, *inter alia:*

> 1. THAT the issues for determination in this cause were heard and determined in Thika CMCC No. 920 of 2009 between A M W v M W K as well as HCCC Kerugoya Matrimonial Cause No. 1 of 2014 M W K v A M W
>
> 2. THAT the marriage between the parties was long determined and the said property disposed off.
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> 3. THAT as such, the Originating Summons offends the provisions of sections 6 and 7 of the Civil Procedure Rules.
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> 4. THAT litigation must come to an end.
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> 5. The file was transferred from Muranga High Court by an order of Justice Hatari Waweru on 04/07/2016. When the matter first came before me, Mr. Makumi for the Respondent and Mr. Muturi for the Applicant both agreed to argue the Preliminary Objection first since it has the potential to be dispositive. The advocates made oral arguments.

B .ARGUMENTS BY THE PARTIES

4. Mr. Makumi told the Court that this is the third case in respect of the same property and referred to paragraphs 11 & 12 of the Replying Affidavit detailing the two other cases. In addition, Mr. Makumi added, there is a divorce matter and another case dealing with children issues. His first point is that the

multiplicity of suits by the Applicant over the same subject matter demonstrates an abuse of the process of the court and a determination on the part of the Applicant to keep filing suits until he gets a Court that gives her the relief she wants. The present application, Mr. Makumi argued, is filed in bad faith, is frivolous and should be dismissed.

5. More particularly, Mr. Makumi argued that the present suit is barred by the doctrine of *res judicata* – and, in particular, section 7 of the Civil Procedure Code. The case, Mr. Makumi argued, has been adjudicated fully in Thika CMCC No. 920 of 2009 *A M W v M W K* as well as HCCC Kerugoya Matrimonial Cause No. 1 of 2014 *M W K v A M W*.

6. Mr. Makumi submitted that Sections 6 & 7 of the Civil Procedure Act, any defence is deemed to have been argued even if they were not raised. Any arguments that could have been made in the Thika or Kerugoya cases are deemed to have been argued there. Hence the matter is, in his opinion, *res judicata.*

7. For his third point, Mr. Makumi was of the view that the suit is moot anyway: the subject matter, to wit LR Ruiru/KIU Block 1/1557, has already been transferred to a third party subsequent to the dismissal of the case in Kerugoya. As such, Mr. Makumi argued, the suit was futile since the law provides that the property being litigated between two spouses or former spouses must be registered in the name of one of them. Mr. Makumi's position is that where, such as here, the property has already been transferred to a third party in the absence of fraud, it is not possible to maintain a suit for division of matrimonial property. Mr. Makumi therefore argued that since the property has already been sold without fraud, there was nothing to hear.

8. Mr. Muturi, for the Applicant, was, naturally, of a different view. He argued that in the Kerugoya matter, the cause was struck out because the court held that the matter should have been filed under Matrimonial Property Act of 2013 instead of the Married Women Property Act of 1882 under which it had been filed. The Court was of the view that the former had been repealed in 2013 by the latter.

9. Mr. Muturi also argued that the Judge in the Kerugoya matter had also ruled that the parties were no longer in corverture and they could, therefore, not bring an action under the Married Women's Property Act given section 1 of that Act defining who was a spouse.

10. However, Mr. Muturi argued, under the Matrimonial Property Act, 2013, both a spouse and a former spouse can bring a case Section 17(1). Hence, the present case easily overcomes the obstacle the Judge in the Kerugoya case had seen. Further, Mr. Muturi argued, whether a suit is *res judicata* or not turns on whether a matter has been conclusively determined and a decree has been issued then neither parties can move the court. His view was that there has to be conclusive determination of issues between the parties in this case and therefore it cannot be said that the matter is *res judicata*.

11. On the multiplicity of cases, Mr. Muturi argued that the Thika matter was about proceedings to remove a caution and not about the matrimonial property. The other case was a divorce case between the parties filed in Kiambu Chief Magistrate's Court in which divorce was granted. The third case, he argued, is the Kerugoya case which was dismissed on a technicality and before the final determination.

12. Finally, on the issue of registration of property, Mr. Muturi argued that these proceedings were commenced on 17/09/2015. Going by the Replying Affidavit, the change of ownership happened on 29/02/2016. Therefore, his position was that since the transfer happened after the proceedings were started, the sale of property does not invalidate the proceedings since the property was registered in the name of one of the spouses.

C. ANALYSIS

13. The main issue here is whether the instant suit is barred by virtue of sections 6 and 7 of the Civil Procedure Act.

14. I begin with the preliminary point that section 6 provides for a stay over suits covering the same

subject matter and between the same parties in another suit covering the same parties and the same subject matter. It is not what is being claimed here so it is inapposite here.

15. Instead, what Mr. Makumi is arguing is that two previous suits – to wit Thika CMCC No. 920 of 2009 *A M W v M W K* as well as HCCC Kerugoya Matrimonial Cause No. 1 of 2014 *M W K v A M W* - have been heard and determined. These suits, Mr. Makumi argues, are between the same parties and over the same subject matter. Hence, section 7 of the Civil Procedure Act is triggered to bar the instant suit.

16. Section 7 of the Civil Procedure Act provides as follows:

> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

17. The section, of course, codifies the doctrine of *res judicata* in Kenya. Our case law has now distilled the essential ingredients of the doctrine – see, for example, ***Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd)* & 2 others [2014] eKLR**; ***Kamunye & others v Pioneer General Assurance Society Ltd* [1971] E.A. 263 and *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR**. There are, restated, four ingredients:

> a. Was there previous litigation in which identical claims were raised or in which identical claims could have been raised?
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> b. Are the parties in the present suit the same as those who litigated the original claim?
>
> c. Did the Court which determined the original claim have jurisdiction to determine the claim?
>
> d. Did the original action receive a final judgment on the merits?

18. Asking these four questions makes the instant task quite straightforward. First, however, I need to preliminarily get one issue out of the way. Mr. Makumi has sought to base his plea of res judicata on both Thika CMCC No. 920 of 2009 *A M W v M W K* ("Thika Case") as well as HCCC Kerugoya Matrimonial Cause No. 1 of 2014 *M W K v A M W* ("Kerugoya Case"). In the Kerugoya Case, he had argued that the suit was barred by *res judicata* based on the Thika Case. The Court dismissed that plea – on two arguments:

> a. First, the Kerugoya Court found that not sufficient materials had not been put before it to conclude that the cause of action raised in the Kerugoya Case was the same as that in the Thika Case.
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> b. Second, even the cause of action was identical, the Kerugoya Court found that the Thika Court did not have jurisdiction to deal with matrimonial property anyway.

19. In other words, the Kerugoya Court dismissed the plea of *res judicata* and found that the question of distribution of matrimonial property between the parties had had not been previously litigated before a competent court to their merits. The Thika Case cannot, therefore, be raised a bar to the present suit there being a decision by a Court of coordinate jurisdiction with these findings. The only question before this Court here, then, is whether the Kerugoya Case itself bars the present suit. I will now delve into this question.

20. From the ingredients of res judicata restated above, we can easily answer the first three questions:

> a. It is clear and it requires little analysis that there was previous litigation in which identical claims

were raised, to wit, the Kerugoya Case.

b. It is also self-evident that the parties in the present suit are the same ones who litigated the Kerugoya Case.

c. Additionally, it is indisputable that the Kerugoya High Court had jurisdiction to determine the claim of distribution of matrimonial property. Section 17 of the Married Women Property Act (1882) and Section 17 of the Matrimonial Property Act, give the High Court jurisdiction over matrimonial property (exclusively for the former and concurrently with other courts in the latter.)

d. That leaves us with only the last question which inquires whether the Kerugoya Case received a final judgment on the merits.

21. Mr. Makumi argues that the answer to the question is in the positive because a party must be deemed to have raised all and any matters which they could have raised in the original claim whether they raised them or not. That is, no doubt, the correct exposition of the law. Indeed, Mr. Makumi here was merely channeling Explanation 4 to the Civil Procedure Act which states:

> *Explanation*. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

22. It is important, first, to understand the ratio of the Kerugoya Case in order to determine if it was a decision on the merits. After dismissing the plea of res judicata as inapplicable, the Court proceeded to strike out the suit anyway on two related issues:

a. First, the Court found that the Court, as founded on the Married Women Property Act of 1882 was not maintainable because the parties were no longer married to each other yet section 17 of the Married Women Property Act required that the parties be in corverture for a suit to be brought under the Act.

b. Second, the Court ruled that the suit was incompetent because it had been predicated on an Act of Parliament (Married Women's Property Act of 1882) which had been repealed and replaced with the Matrimonial Property Act, 2013. Indeed, the Court found that the Kerugoya Case had been instituted more than 40 days after the commencement of the Matrimonial Property Act, 2013.

23. Hence, while the Court dismissed the Preliminary Objection based on the plea of res judicata it suo motto raised the issue of the incompetence of the suit and struck it out as incompetent and unsustainable with no order as to costs.

24. The Applicant responded to the striking out by bringing the present suit. The question, then, is if the suit is barred by the plea of res judicata. Can we say, based on the above ratio decidendi by the Court that the Kerugoya Case received a final judgment on its merits?

25. I have come to the conclusion that it does not. Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by *res judicata* when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. *Res Judicata* bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of *res judicata*. The last issue (dismissal for want of prosecution) was the issue in ***TheTee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd*** **[2005] KLR 97; LLR CAK 6880**. Here the Court of Appeal was explicit that *res judicata* does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits.

26. In the present case, the Judge struck out the suit because it had been predicated on the wrong provisions of the statute. Instead of predicating the case on the Matrimonial Property Act of 2013 (whose commencement date was 16/01/2014, the Applicant carelessly predicated her suit on the Married Women Property Act of 1882. It should be pointed out that this issue was raised *suo motto* by the Learned Judge in his ruling on another preliminary objection. It is not clear if the parties had an opportunity to address the issue or cure the imperfection of the suit. In any event, in the circumstances of the case here, it would be a stretch to conclude that the matter was determined on their merits.

27. The legal position that the Court comes to, then, is that a suit which is struck out as being incompetent solely for being predicated on the wrong statutory provision does not trigger the application of the doctrine of *res judicata*. This interpretation is in accord with our jurisprudence's general preference for deciding, within limits of reasonableness, cases on their merits as opposed to technicalities. It is further supported by the constitutional principle now anchored in Article 159(2)(d) of the Constitution that Courts shall endeavour to do justice without undue regard to procedural technicalities. To permanently bar a party from litigating an interest in property solely on the mistake of counsel to frame the litigation on the correct statutory provision will be to elevate form over substance and to engage in a particularly virulent form of "root canal" formalism of the kind Article 159(2)(d) of the Constitution sought to exorcise.

28. There are two other issues that require resolution at this preliminary stage. The first one is the issue raised by Mr. Makumi that the property is now registered in the name of a third party and there is, therefore, nothing left to hear. Consequently, he argued, the suit is moot. The second, is issue raised by the Learned Judge in the Kerugoya Case to wit that the Kerugoya Case was not maintainable for the reason that the parties were no longer married to each other.

29. Both these issues are resolved by the application of section 17 of the Matrimonial Property Act, 2013 under which the present suit is predicated. The section 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)—
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> (a) shall be made in accordance with such procedure as may beprescribed;
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> (b) may be made as part of a petition in a matrimonial cause; and
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> (c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.

30. This section is quite clear that even a former spouse can bring a cause for determination of rights to any property that is contested between that party and a former spouse. In the same vein, there is nothing in this section that limits the application of that section only to property that is currently registered in the name of either spouse. Mr. Makumi proposes a truly cynical reading of the statute: that the rights of one spouse dissipate as soon as the other spouse transfers property registered in that spouse's name, even if it is matrimonial property as long as the aggrieved spouse cannot prove that the transfer was a product of fraud. A plain reading of the statute does not lend itself to this interpretation and the mischief rule would forestall any such interpretation. It is not conceivable that Parliament, in an attempt "to provide for the rights and responsibilities of spouses in relation to matrimonial property" intended to pass a law whose effect would be to disinvest victims of spouses who are swift enough to transfer the matrimonial property to a third party before the other spouse perfects a suit for the distribution of the property.

D. DISPOSITION AND ORDERS

31. The obvious conclusions from this analysis, then, is that:

a. The present suit is not barred by a plea of *res judicata* as there has been no determination of the claim between the parties on its merits.

b. The fact that the marriage between the two parties has already been dissolved is not a bar to the present suit.

c. The fact that the contested property has been transferred to a third party is not a bar to a suit for determination of matrimonial property.

32. Consequently, I find the Preliminary Objection raised by the Respondent to be unmeritorious. I dismiss the same with costs.

33. The Originating Summons shall be set down for directions on its disposition.

Dated and delivered at Kiambu this 12th day of October, 2016.

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JOEL NGUGI

JUDGE