



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
CIVIL SUIT NO. 17 OF 2015

BWK.....PLAINTIFF

VERSUS

EMG.....DEFENDANT

RULING

PLEADINGS

The plaintiff filed Originating Summons on 24th March 2015 brought under **Article 159 (2) of Constitution 2010, Section 28 of Matrimonial Property Act 2013 and Section 93 (2) of the Land Registration Act and any other enabling provisions of the Law.**

The Plaintiff sought orders declaring that the listed properties in paragraphs 1-5 of the Summons were acquired during the subsistence of the marriage and/or acquired by joint funds and efforts of the Plaintiff and Defendant and is therefore joint matrimonial property.

The Plaintiff sought orders that the Court restrains the Defendant by an injunction to restrain him from transferring, charging, disposing and/or otherwise wasting the properties listed in paragraphs 1-5 of the Summons.

The Plaintiff filed on the same date a Notice of Motion and sought injunctive orders over listed properties and monies in paragraph 2-7 of the Motion.

The Defendant filed a Replying Affidavit on 8th May 2015 and listed properties that the Plaintiff owns and businesses she runs.

By an application filed on 8th May 2015, the Respondent filed a Notice of Preliminary Objection to the Plaintiff's Originating Summons and Notice of Motion.

The gist of the Preliminary Objection is that this Court has no jurisdiction to hear and determine the matter as outlined in the Originating summons as the parties are still legally married. The Respondent asserts that the Plaintiff's Application has not met the threshold for granting of an injunction. The Summons and Application ought to be dismissed with costs to the Defendant.

The matter was scheduled to proceed for hearing on 28th May, 2015 when the Defendant through Learned Counsel raised the Preliminary Objection.

The Plaintiff through Learned Counsel sought time to file a Reply on the Preliminary Objection. It was agreed that on 9th July 2015, parties would highlight submissions. On the date, Counsel for both parties were present and instead they agreed and sought a ruling date on the Preliminary Objection.

LAW

The definition of a Preliminary Objection has been settled in the celebrated case of **MUKISA BISCUITS MANUFACTURING CO.LTD VS WESTEND DISTRIBUTORS [1969] E.A.696 LAW J.** stated;

“A preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.”

In **ORARO vs. MBAJA [2005] 1KLR OJWANG J** (as he then was) stated;

“A preliminary objection is now defined as and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event to be proved through the processes of evidence. Any assertion, which claims to be a Preliminary Objection yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not as a matter of legal principle, a true Preliminary objection that the Court should allow to proceed. Where a Court needs to investigate facts a matter cannot be raised as a preliminary point.”

See also **JACKSON GILO VS COMPUTER PRIDE INDUSTRIAL COURT 1062 OF 2012**

In the instant case the defendant raised a matter of law that is the Court’s jurisdiction to hear and determine the matter at hand. The objection is based on the fact that the Plaintiff and Defendant are legally married and this fact is not contested.

To determine the Court’s jurisdiction to hear or not to hear the Originating Summons; the Court relies on the following provisions;

Section 12 (2) of Matrimonial Property Act, 2013 provides;

“An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without consent of both parties, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.”

Section 17 (1) of Matrimonial Property Act 2013 provides;

“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.”

Section 17(2)(c) of Matrimonial Property Act, 2013 allows for filing an application under **Section 17(1) of the Act** for declaration of rights to property; notwithstanding ‘*that a petition [for divorce] has not been filed under any law relating to matrimonial causes.*’

The case-law on declaration of rights of a spouse over matrimonial property while in a subsisting marriage is;

1. **REGINE BUTT VS HAROON BUTT & AKHTAR BUTT CIVIL SUIT NO 8 OF 2014**
2. **FNK vs PKN 2014 eKLR**

Therefore, by virtue of the cited provisions of law, division of matrimonial property shall ensue after dissolution of marriage. However, in the interim in a subsisting marriage, any of the parties to the marriage may apply for a declaration of rights in matrimonial property to safeguard a spouse’s ownership and or beneficial interest over matrimonial property.

In order to endure that each party safeguards the right to enjoy and benefit the matrimonial property, the said property shall be preserved and protected from waste, disposal, diversion or transfer before proceedings to establish each party's proprietary right in the property is established.

To protect and preserve these properties, a party may seek injunctive relief it can establish by evidence the grounds set out in the celebrated cases of;

GIELLA vs. CASSMAN BROWN (1973) E.A. 358

E.A INDUSTRIES vs. TRUFOODS (1972) E.A. 420

The party shall present evidence to establish a *prima facie* case with probability of success. The party shall show that they will suffer irreparable damage and loss from the Respondent's conduct if an injunctive order is not granted. If the party shall not establish a *prima facie* case, the Court may consider the issuance of an injunction on a balance of convenience.

The injunctive relief is not only available when a marriage between parties is dissolved but also during the subsistence of a valid marriage. It is amenable to the Plaintiff /Applicant subject to the establishment of a *prima facie* case.

In the instant case; both Plaintiff and defendant concede that they have been legally married for 35 years. It is *prima facie* evidence that they may have jointly acquired the listed properties which may comprise of matrimonial property. However, the extent of each spouse's contribution, ownership right or beneficial interest can only be established at the *inter partes* hearing of the Originating Summons and Notice of Motion. Therefore, it is for the Court to ensure the Matrimonial property is preserved pending the hearing.

From the pleadings, the Defendant is in possession and in charge of most of the properties. The Plaintiff / Applicant claims she purchased and/or contributed to acquisition of these properties. This Court issues interim *ex parte* injunctive orders to restrain the Defendant from alienating, disposing, transferring, selling, subdividing the matrimonial properties that consist of the family's matrimonial home and family business.

There are properties that are confirmed as joint properties that shall also be preserved to the hearing and determination of the matter.

FINAL ORDERS

Therefore, the Court orders as follows;

1. The Preliminary objection raised on 8th May 2015 is hereby dismissed with costs to the Plaintiff/Applicant.

2.The Court orders an interim *ex parte* injunction restraining the Defendant from alienating, disposing in any way, selling, subdividing, transferring, subdividing or taking any action that may prejudicially affect the Plaintiff's rights in the following properties;

- a) Plot No [Particulars Withheld] (the matrimonial home)**
- b) L.R. [Particulars Withheld] –[Particulars Withheld] Estate**
- c) L.R. 5982/[Particulars Withheld]**
- d) L.R.5982/[Particulars Withheld]**
- e) L.R. No [Particulars Withheld]**

f) [Particulars Withheld] Stationaries Limited (Family Business) pending hearing *inter partes* of the Originating Summons and Notice of Motion.

3. The Parties shall obtain a hearing date for directions on the hearing and determination of the pending applications.

4. Each party is at liberty to apply.

5. No orders as to costs.

DATED, SIGNED & DELIVERED IN OPEN COURT AT NAIROBI THIS 21ST OCTOBER, 2015

M.W. MUIGAI

JUDGE

In the presence of;

Counsel and parties