



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 43 OF 2010 (OS)**

**J K W.....APPLICANT**

**VERSUS**

**E W K.....RESPONDENT**

**RULING**

The Applicant and the Respondent were husband and wife. They were however divorced by the subordinate court in **Divorce Cause No.174 of 2004 J K W –vs- E W K**. The decree nisi was issued on 23<sup>rd</sup> June 2010. It was made absolute on 23<sup>rd</sup> January 2011. The Applicant has filed this case seeking essentially the distribution of matrimonial property. The subject of the suit are four (4) properties namely LR. No. Kileleshwa [*particulars withheld*], Plot No. [*particulars withheld*] Kayole, a plot bought from Uiguano wa Kirere situate near Kenyatta University and a plot bought from Embakasi Ranching Company situate at Embakasi. In his suit, the Applicant alleges that he purchased the suit properties using his own resources. The two properties *i.e.* the Kileleshwa and Kayole, were registered in his name. On the two properties are constructed rental premises which accrue monthly rental income. The rental incomes are however collected by the Respondent to the exclusion of the Applicant. The Respondent denies that the suit properties are owned by the Applicant. While conceding that the suit properties are registered in the Applicant's name, it is the Respondent's case that she substantially contributed towards the acquisition and the development of the said properties. In the case of the Kileleshwa property, it was her case that the same was allocated Applicant's name due to the effort of their late daughter I N who sought the intervention of the former President Daniel arap Moi to be allocated the particular property. It is therefore the Respondent's case that the Applicant had no basis at all to claim the property. The suit on division of matrimonial property is yet to be heard and determined.

On 21<sup>st</sup> August 2013, the Applicant filed an application pursuant to the provisions of **Order 51** of the **Civil Procedure Rules** and **Sections 1B** and **3A** of the **Civil Procedure Act** seeking several orders from the court. The first order sought to compel the Respondent to pay him the sum of Kshs.150,000/- as monthly maintenance from the rental income received from the Kileleshwa and Kayole properties. The Applicant further prayed that the Respondent be compelled to provide accounts for the rents received from the two properties with effect from 2004 to the time the application was filed. Further to the above prayers, the Applicant prayed for an order that he be granted exclusive right to collect rent from the suit premises in the place of the Respondent. He finally prayed that a qualified estate agent be appointed by the court to collect the rent from the suit premises in the place of the Respondent. The application is supported by grounds stated on the face of the application and the supporting affidavit of the Applicant.

The application is opposed. The Respondent filed a lengthy replying affidavit in opposition to the application. In essence, she accuses the Applicant of concealing material information from the court. This information includes the fact that the Applicant had filed another suit *i.e.* HCCC. No.10 of 2006 in which he sought similar prayers to the present suit. She further stated that the two properties did not belong to

the Applicant. Neither did the Applicant contribute towards its construction. She stated that she contributed towards the purchase of the Kayole property and therefore was entitled to enjoy rental income from the same. She reiterated that the Kileleshwa property did not belong to the Applicant but was registered in his name after intervention by their late daughter to the former President Daniel arap Moi. She deponed that the Applicant was therefore registered as the owner of the said property in trust for the entire family. She denies the allegation by the Applicant to the effect that the two properties attract rental income to the sum of Kshs.300,000/-. It was her case the total income earned from the two properties was Kshs.92,000/- . She uses this sum to sustain herself and her children. It was therefore her case that the Applicant was not entitled to the prayers sought in the application. She urged the court to dismiss the same.

During the hearing of the application, this court heard oral rival submission made by Mr. Kalii for the Applicant and by Mr. King'ara for the Respondent. The court has carefully considered the said submission. The issue for determination by this court is whether the Applicant established a case for this court to grant him the orders that he sought in his application. As stated earlier in this ruling, the dispute between the Applicant and the Respondent relates to the distribution of matrimonial property. As expected in such cases, each party insists that he/she is entitled to a larger portion of the properties in issue. That issue, will however be determined by this court during the full hearing of the case. In this application, the Applicant is seeking, as it were, interim measures to enable him benefit from the rental incomes from the two properties that are the subject of the matrimonial property dispute. The Applicant has been able to establish that he is the registered owner of the two properties. Questions have been raised by the Respondent challenging the ownership of the two properties by the Applicant. Those questions will be answered during the full hearing of the case. This court cannot however ignore the fact that as things stand now, the Applicant is the registered owner of the two properties and therefore presumed to be the legal owner. The Applicant submits that he is currently ailing and destitute. He depends for financial support on his current wife. He would like to benefit from the rental income accruing from the two properties pending the hearing and determination of the matrimonial property dispute. The Respondent is opposed to this request. This court is of the opinion that the request made by the Applicant is not unreasonable in the circumstances of this application. Under **Section 6 of the Matrimonial Property Act (Act No.49 of 2013)** defines matrimonial property. It states thus:

***“6(1) For the purposes of this Act, Matrimonial property means-***

***a) the matrimonial home or homes;***

***b) household goods and effects in the matrimonial home or homes; or***

***c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.***

***(2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.***

***(3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.***

***(4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.”***

From the above section, it is evident that the court will reach a finding that the Applicant will at the very least be entitled to ownership of part of the two properties. The Applicant has therefore persuaded this court that he is entitled to receive income from the two properties on an interim basis, pending the

hearing and determination of the division of matrimonial properties in dispute. The Respondent will not be prejudiced because she likewise would continue benefiting from the rental income received from two properties, albeit at a reduced rate.

In the premises therefore, this court will allow the Applicant's application in the following terms: this court gives direction that the parties agree on an estate agent to manage the two properties within fourteen (14) days of the delivery of this ruling. In default thereof, the parties shall each supply to the court a list of three estate agents from which the court shall appoint one to manage the two properties. The rental income, less expenses, shall equally be shared between the Applicant and the Respondent. This order shall apply in respect of the rental income received from April 2014. There shall be no orders as to costs. This order shall apply until the hearing and determination of the present suit on division of matrimonial property.

**DATED AT NAIROBI THIS 22<sup>ND</sup> DAY OF APRIL, 2014.**

L. KIMARU

**JUDGE**