



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 49 OF 2007

J.R.K.N..... APPLICANT

VERSUS

R.G.N.....RESPONDENT

RULING

PRELIMINARY OBJECTION

PLEADINGS:

By a Notice of Preliminary Objection filed on 17th June 2014, the Respondent opposed the originating summons filed on 16th October 2007 on the following grounds;

- a. This matter is Res judicata of **Divorce Cause No.30 of 2006** which matter was already concluded and the originating summons of 17th June 2014 cannot stand in law.
- b. The originating summons of 17th June 2014 offends the letter and spirit of the **Matrimonial Cause Act Cap.152 of Laws of Kenya**.
- c. The originating summons can only proceed and be determined after the hearing and determination of Divorce proceedings in **Divorce Cause No.100 of 2013**.
- d. The matters raised in the originating summons of 17th June 2014 have been raised on the assumptions of the presumption of marriage and dissolution thereof which matters are being litigated between the parties in the said **Divorce Cause No.100 of 2013**.
- e. The Applicant herein who is the Respondent in **Divorce Cause No.100 of 2013** has sought prayers for a final capital settlement in her counter petition and the prayers sought in the Originating Summons herein have already been raised in the Divorce Cause and the prayers can be fully and properly ventilated in **Divorce Cause No.100 of 2013**.
- f. The suit is misguided, bad in law, fatally defective and an abuse of the process of the court and should be dismissed with costs to the defendant respondent.

The Respondent's filed submissions on the Preliminary Objection on 18th September 2014 and raised the following grounds;

- a. **Section 7 of Matrimonial Property Act No.49 of 2013** enshrines that matrimonial property shall be divided between the spouses after the divorce or their marriage has otherwise been dissolved.
- b. **Section 27(i) of the Matrimonial Causes Act** (now repealed) did provide that the court has power to order a settlement of matrimonial property in a case where the court pronounces a decree

for divorce or for judicial separation.

- c. **Section 17 of Matrimonial Property Act** provides that a person may apply to a court for declaration of rights to any property that is contested between the parties.
- d. The interpretation is that a party may file a stand-alone application for division of matrimonial property or where there is a petition for divorce the matter for division for matrimonial property may be decided in the same cause.
- e. The division for matrimonial property cannot precede the substantive divorce proceedings which determine the status of the parties. Before the Honourable Court determines the issue of matrimonial property; it will require evidence to determine whether a marriage existed between the parties or not and thereafter delve into the issues of the property.
- f. The grounds raised in the originating summons are that the Applicant and the Respondent were married through cohabitation and therefore should share matrimonial property.
- g. There is reference to case law that parties still being man and wife and not yet divorced, the application for division of matrimonial property must fail.

There is case law to suggest that in the absence of a cause for divorce, the court had no jurisdiction to entertain an application for division of matrimonial property. There is case law also to inform the fact that the court had no jurisdiction to alienate the suit lands between spouses during their lifetime or unbroken coverture.

- h. The Respondent's view is that the preliminary objection should be disposed of first as it raises substantial issues before delving into the hearing of the originating summons and its merits.
- i. On the doctrine of *res judicata*, the applicant filed **Divorce Cause No.30 of 2004 in Chief Magistrate's Court**. The Respondent prepared an appeal which was withdrawn on 14th August 2013. The orders of the said cause were overturned by the other court. The first originating summons offends the prayer of *res judicata* as the issues raised are similar to those in the said cause.

Similar issues raised in the originating summons are also raised in the applicant's cross-petition and Answer to petition of 24th June 2013. This is an abuse of the court process.

The applicants filed submission on the preliminary objection on 3rd October 2014 and raised the following grounds;

- a. The background to this cause is that Divorce Cause 30 of 2004 was filed on 5th December 2004. The prayers sought were;
 - i. A declaration of marriage
 - ii. Dissolution of the marriage
 - iii. An injunctive relief barring the defendant from assaulting and molesting the plaintiff

The court awarded interim/monthly allowance of Kshs.150, 000/=

- b. Subsequently, the defendant filed

High Court Misc. Application 532 of 2004

High Court Civil Case 19 of 2005

High Court Appeal 29 of 2006

The issue of maintenance was settled by court to Kshs.70, 000/= a month.

- c. **High Court Appeal 29 of 2006** was withdrawn and the defendant filed **High Court Divorce Cause No.100 of 2013**.
- d. The Respondent filed cross-petition and sought an order for reinstatement of alimony or further assessment of alimony.

The defendant did not file a reply to the cross-petition.

Parties have not agreed on the out of court settlement. They agreed to pursue a settlement and record consent in the said matter.

- e. The preliminary objection should raise a pure point of law which is argued on the assumption that all the facts pleadings by the other side are correct.
- f. The preliminary objection has been raised late in the day as it was never raised in any of the substantive proceedings. The matter was filed in 2007 to date. The preliminary objection was not raised until 7 years later and was never pleaded in any of the pleadings filed.
- g. The preliminary objection is filed on the basis of **Chief Magistrate Divorce Cause of 30 of 2004** and the first **High Court Divorce Cause 100 of 2013**.
- h. The defendant is relying on the **Matrimonial Property Act; 2013**, which came into effect after the filing of the case and may not operate retrogressively.
- i. The applicant contested the issue of *Res judicata*. **Section 7 of the Civil Procedure Act** outlines what amounts to *Res judicata*. There is no case that has determined the issues raised in the originating summons of 17th June 2007.
- j. If the *Res judicata* prayer is to apply, by virtue of **Magistrate's Court Case No.30 of 2004, the High Court Case No.100 of 2013** would not have been filed.
- k. **Chief Magistrate's Court Case No.30 of 2004** was for alimony/maintenance therefore an application was lodged No.29 of 2006 which was withdrawn. **Chief Magistrate's Court Case No.30 of 2004** was terminated on the basis of the Magistrate's Court jurisdiction.
- Case law was referred to suggest that unlike other matters or issues, marriage matters cannot be subject to *Res judicata* the marriage evolves either in renewal or in death and shifts and changes cannot be overlooked.
- m. Case law referred to depicts striking out of pleadings as a process to deprive a party an opportunity to present his case and is held to be a draconian measure only to be employed as a last resort and in the clearest of cases

ORAL SUBMISSIONS:

The parties filed their written submissions pursuant to a court order of 24th July, 2014. The parties did not appear in court. Counsel for the Applicant attended in court on 18th September, 2014 and sought a Ruling date on the issues raised in the submissions by both parties.

ISSUE(S)

1. Whether the preliminary issue raised is a matter of law or law and/or fact
2. Should the preliminary objection be upheld or dismissed?

LAW:

In Mukisa Biscuits Manufacturing Co. Ltd –vs- Westend Distribution Ltd (1969) E.A. 696 provides:

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

In Alfaraj Limited –vs- Raytheon Aircraft Credit Corporation & Another (2000) KLR C.A. 29 of 1999 stipulates:

“Any issue regarding jurisdiction ought to be considered first so that in the event of the court coming to the conclusion that it has no jurisdiction, the intellectual exercise of going into the merits of the application would be futile.”

This court is guided by the following legal provisions:

1. **Article 159(2)(d) Laws of Kenya 2010**
2. **Order 2 Rule 14 Civil Procedure Rules 2010**
3. **Section 1A Civil Procedure Act**
4. **Section 1B Civil Procedure Act**

Whose overriding objective is just expeditious, proportionate and affordable resolution of disputes.

EVALUATION

From the above cited cases, the matter for consideration at this stage is the preliminary objection of 17th July 2014.

Is it a matter of law or law and fact?

The reading of the issues raised there is a matter of law, the principle of Res Judicata as envisaged by **Section 7 of the Civil Procedure Act** is as follows;

“No court shall try and 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, litigation under the same title, in court competent to try such subsequent suit or the suit in which such issues has been subsequently raised and has been heard and finally decided by such court.”

The originating summons of 17th June 2014 is on division of matrimonial property between the applicant and Respondent.

In **Divorce Cause No.30 of 2004** the issue of division of matrimonial property was not raised and if raised could not be heard and determined. Division of matrimonial property is the preserve of the High Court and could not be heard and determined in the Magistrate Court.

H.C. Civil Case No.19 of 2005 was based on extension of time to file an appeal which was granted. Again the issue of division of matrimonial property was not canvassed. **H.C. Appeal 29 of 2006** was an appeal lodged based on the court orders of the **Divorce Cause 30 of 2004** on maintenance awarded at Kshs.150, 000/- a month. On appeal by consent of parties it was reduced to Kshs.70, 000/- a month. Again, the issue of division of matrimonial property was not heard and determined. **High Court Divorce Cause 100 of 2013** was filed and the Plaintiff filed a cross-petition where she sought *“reinstatement of alimony or fresh assessment of alimony”*. This is not synonymous to division of matrimonial property. Secondly, the issues therein have not been heard and determined and remain pending.

The parties recorded consent to discuss and agree on the question of full and final settlement and in the absence of any agreement the court would make a determination on the issue of quantum.

Therefore none of the cases filed in court by the Applicant and the Respondent have had the issue of division of matrimonial property heard and determined. The principle of *Res judicata* would not appropriately apply in the instant case and would not bar the hearing of the originating summons of 16th October, 2007.

The 2nd issue of law raised by the Respondent in the preliminary objection is when should matrimonial property be shared or divided? Whereas the originating summons of 6th October, 2007 centers on division of matrimonial property; the legal provisions and case law referred to indicates as follows;

- a. **Section 7 of the Matrimonial Property Act No.49 of 2013** envisions matrimonial property to be divided after divorce or dissolution of the marriage.
- b. **Section 27(1) of the Matrimonial Cause Act (repealed)** provided the court had powers to settle Matrimonial Property where the court pronounces a decree for divorce.
- c. **Section 17 of the Matrimonial Property Act No. 49 of 2013** provides that a person may apply to a court for a declaration of rights to any property that is contested between the parties. There cannot be division of matrimonial property until the parties are divorced. The cases cited to fortify the parties position are as herein below;
 - i. **In Divorce Cause No.90 of 1997 MMN –Vs- NGN 2001 KLR** the Court held; **Khamoni J**

The Applicant cannot get the order he is seeking as the Court should not be used to divide the family and the income of the family which is living together.

- (ii) **In Civil Suit 33 of 2013(OS) EWM –Vs- EMK (2014) eKLR** the Court held

Musyoka J

- i. **The Applicants is obliged to establish several facts.**
- ii. **There was a marriage between Applicant and Respondent.**
- iii. **The marriage is no longer tenable as may be evidenced by proceedings for dissolution of marriage.**
- iv. **The property is matrimonial property acquired during marriage.**
- v. **The Applicant contributed in one way or another to the acquisition of the property.**

The Applicant also made a spirited effort that the issue of division of matrimonial property can and should be determined during the subsistence of the marriage during the divorce proceedings as enunciated in the case of; **MMK –vs- KW (2008) KLR**

This court appreciates the list of cited cases which provide a useful guide on the way forward; this court is of the view that whether the division of matrimonial property should be before, during or after divorce, existence and dissolution of the marriage is one of the triable issues during the hearing of the originating summons of 17th October, 2007.

To curtail the issue through a preliminary objection is to shut out a party from presenting its case and the court the opportunity to determine the issue on its merits.

If the issues raised in the originating summons on 17th October, 2009 are similar to the issues raised in **H.C. 100 of 2013** then the originating summons is not barred from being heard as the similar issues in **H.C. 100 of 2013** have not been heard and determined. They have only been pleaded, raised not finally decided by a court. Therefore, the issue of when division of matrimonial property should occur is one of

the issues of determination and interpretation of the various provisions of law on the subject.

Secondly, the preliminary objection does not indicate that the division of matrimonial property is not an issue to be heard, the contention is or when it should be heard. This should not be addressed by striking out the originating summons but for it to be heard in order to meet the ends of justice. Also there should be Consolidation of **HCC 100 of 2013 with 49 of 2007** and they are heard together or stay one over the other but none of the matters should be barred from being heard and determined.

There are a number of issues to be determined in order to arrive at the question of division of matrimonial property;

- a. Is there a marriage if so what type and proof of the same?
- b. Has dissolution of the marriage occurred?
- c. Which law is applicable?

- Matrimonial Causes Act (repealed) – marriage
- Married Women Property Act (repealed) – property
- Marriage Act 2013 – marriage
- Matrimonial Property Act 2013 – property

- d. What constitutes Matrimonial Property?
- e. Should there be a

- i. Declaration of rights in matrimonial property? and/or
- ii. Division of Matrimonial Property?

- f. What is the direct/ indirect contribution of each party?

The Preliminary Objection on the aspect of when the division of property should be heard and determined is premature as it will pre-empt the applicant from presenting her case and be heard on merit. When the division should be done is one of the issues for determination in light of the prevailing laws.

FINDING

1. The court finds the preliminary objection of 17th June, 2014 not merited and is not upheld but dismissed.
2. The matters canvassed in other case are not Res Judicata as they are not finally determined in any of the cited cases.
3. When division of matrimonial property should be allowed whether before or after divorce is a triable issue for determination is the hearing of the originating summons of 17th June, 2014.
4. The originating summons of 17th June, 2014 to proceed for hearing on a date to be obtained by the parties in the Registry.
5. No orders as to costs.

READ AND SIGNED IN THE PRESENCE OF:

Mr. Gathira for the Plaintiff and

Mr. Munyalla for the Respondent

DATED AT NAIROBI THIS 15TH DAY OF DECEMBER, 2014

M. MUIGAI

JUDGE