REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

DIVORCE CAUSE NO: 37 OF 2012

E W M..................................PETITIONER

VERSUS

DR. P M................................RESPONDENT

RULING

The cause herein was commenced on 5th March 2012 by way of a petition for separation, custody of children, maintenance, surrender of vehicles, injunctions and declaration of trust. To the petition dated 1st March 2012, the respondent has raised a preliminary objection by a notice dated 29th March 2012, raising the grounds of lack of jurisdiction and incompetence.

On jurisdiction, principal argument is that by virtue of ***Section 14*** of the African Christian Marriage and Divorce Act, Cap 151, as read with ***Section 3*** of the Matrimonial Causes Act, the High Court has no jurisdiction to hear petitions with respect to marriages contracted under the African Christian Marriage and Divorce Act. The marriage herein was contracted under the the African Christian Marriage and Divorce Act. This is not in dispute. That being the case, the respondent argues there is no jurisdiction to hear and determine this separation cause.

Section 14 of the African Christian Marriage and Divorce Act provides:-

> ***"Subordinates courts of the first class shall have the same jurisdiction, in the case of marriages solemnized or contracted under this Act or the Native Christian Marriage Act (now repealed), as it is vested in the Supreme Court by virtue of the Matrimonial Causes Act".***

Section 3 of the Matrimonial Causes Act provides:-

> ***" Subject to the provisions of the African Christian Marriage and Divorce Ordinance, jurisdiction under the Ordinance shall only be exercised by the Supreme Court... and such jurisdiction shall, subject to the provisions of this Ordinance, be exercised in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England".***

The provisions cited above vest jurisdiction in the subordinate court of the first class with respect to marriages contracted under the African Christian Marriage and Divorce Act. ***Section 14*** of the said Act is in mandatory terms and therefore it confers exclusive jurisdiction on the lower court so far as matrimonial causes in respect of marriages contracted under the African Marriages and Divorce Act concerned. The High Court has no jurisdiction. Indeed, the African Marriage and Divorce Act are

confers on the High Court by virtue of ***Section 15***, appellate jurisdiction over appeals from decrees and orders of the subordinate court arising from the exercise of jurisdiction by the said surbordinate courts under ***Section 14*** of the said Act.

The petitioner counters this argument by citing the decision by Kubo J in *George Gitau Wainaina -vs- Rose Margaret Wangari Wainaina* (2004) eKLR, where it was held that the High Court has unlimited original jurisdiction and it can therefore ***"try cases triable by the subordinate courts if there is good case for the High Court to do so if it can find time for such cases".*** It was also held that the ***Section 14*** of the said Act and ***Section 3*** of the Matrimonial Causes Act are discriminatory.

Notwithstanding the decision by Kubo J in decision cited above, the position started in ***Sections 14*** and ***15*** of the African Marriage and Divorce Act and ***Section 3*** of the Matrimonial Causes Act remains the law in Kenya on the jurisdiction of the subordinate courts with respect to matrimonial causes for marriages contradiction under the African Christian Marriage and Divorce Act. The court in that matter did not strike out the said provisions and therefore they remain in force. That decision has created a situation which as resulted in the High Court, and the lower courts exercising parallel and concurrent jurisdiction over causes emanating from marriages celebrated under the African Christian Marriage and Divorce Act. This is unpalatable It creates disortion and confusion. It vests the High Court with both original and appellate jurisdiction so far as those causes are concerned. There is a possibility that a person whose marriage was celebrated under the African Christian Marriage and Divorce Act and who seeks relief at the High Court may end up without a right of appeal in view of ***Section 15*** of the said Act which provides for a right of appeal to the High Court. The decision in *George Gitau Wainaina -vs- Rose Margaret Wangari Wainaina* did not create a right of appeal from High Court to the Court of Appeal. Needless to say, a right of appeal is statutory, it cannot be created by a court.

Kubo J in *George Gitau Wainaina* -vs- *Rose Margaret Wangari Wainaina*, was sitting as a High Court judge. He was exercising a jurisdiction concurrent to mine. His decision in that matter does not bind me. The authority in it is merely persuasive. With respect, I am not persuaded and to that extent I find that the separation cause relating to the marriage celebrated between E W M and P M ought to have been commenced at the subordinate court. Jurisdiction over are causes arising from marriage celebrated under the African Christian and Divorce Act is vested in that court and in view of ***Section 15*** of the said act, the High Court has no original jurisdiction to entertain such causes.

The respondent's other contention is that, apart from the prayers for separation and custody of children, there is no jurisdiction to entertain the petition on the other several prayers. In these prayers the petitioner is asking for:-

(a) that the children of the marriage be allowed to remain and reside in the matrimonial home at LR 7336/54 Miotoni Road Karen.

(b) that the respondent be condemned to maintain the petitioner and the children to the tune of Kshs.500,000.00 permonth.

c. that the respondent be condemned to meet the expenses for school fees, school equipment, food, transport, medical care electricity, telephone and entertainment for the petitioner and the children.

d. that the respondent be ordered to surrender to the petitioner, two specified motor vehicles for her use at the farm and for dropping the children at school, and that he be ordered to maintain and service the said motor vehicles.

(e) that a perpetual injunction be granted to restrain molestation, harassment assault and intimidation of the petitioner by the respondent.

(f) that the an injunction be granted to restrain the respondent from selling or disposing of or interfering with the matrimonial property listed in prayer 8 of the petition.

(g) that the petitioner be joined as a co-owner of the property specified in prayer 9 of the petition.

The respondent's position is that the reliefs sought in these prayers cannot be granted on a petition for judicial separation. The argument appears to be that such claims are excluded by Rule 3 (5) of the Matrimonial Causes Rules. With respect to the issues raised in prayer 9 of the petition, about the petitioner being co-joined as owner of the properties listed in that prayer, the respondent argues these are matters that cannot be addressed by the court on a petition of judicial separation. Likewise, it is argued that issues relating to the children of the marriage are best handled in the Children's Court as that court has original jurisdiction to determine all matters affecting children.

To these submissions, the petitioner argues that the issues touching on children, maintenance, custody of property and injunctions ought not be delved into at this stage as they require the calling of evidence and, in any event, this being a separation and maintenance cause, it is important that matrimonial preserved be presence pending the disposal of the suit.

Alimony pending suit, and even after, is provided for in ***Section 25*** of the Matrimonial Causes Act and Rule 3(5) of the Matrimonial Causes Rules. It is a relief that the court can grant in a matrimonial cause that is properly before it. Likewise, the court faced with a separation suit has, jurisdiction to address the issue of custody of children and their maintenance. It is to be noted, however, that there is concurrent jurisdiction between a divorce court, seised of a separation suit and the Children's Court in this regard. The jurisdiction given to the Children's Court is broader and it would therefore be preferable that all matters relating to children ought to be placed before that court.

The Matrimonial Causes Act does not provide the relief sought in prayer 9, that of the petitioner being joined as owner to property registered in the name of the respondent or acquired by the respondent. ***Sections 27*** and ***28*** of the Matrimonial Causes Act do provide for settlement of a spouse's property, however, in my view the relief provided by ***Sections 27*** and ***28*** of the Act does not cover the remedy sought in prayer 9. The proper action in that respect lies in bringing proceedings under ***Section 17*** of the Married Women's Property Act, 1882. This court clearly has no jurisdiction in the separation cause to deal with matters that ought to be the subject of a suit under ***Section 17*** of the Married Women's Property Act, 1882.

The respondent in the Notice of Preliminary objection argues that the suit offends ***Section 11*** of the Civil Procedure Act, Cap 21, Laws of Kenya. ***Section 11*** of the said Act deals with the place of suing, and indicates the courts in which a suit may be instituted. The provisions states:-

> ***"Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same district competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts:***

Provided that-

> ***"(i) if a suit is instituted in a court than a other court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade component to try it if in his opinion there is no point of law involved or no good and sufficient reason for instituting the suit in his court, and***
>
> ***(ii)..."***

I note that the respondent did not dwell on this point in his written submissions. The petitioner does not specifically deal with in it, save to say that the suit is founded on constitutional provisions and the subordinate court has no jurisdiction to interprate the Constitution. She also argues that the lower court has no pecuniary jurisdiction as the value of the property the subject of the suit was in excess of Kshs.50,000,000.00, yet the jurisdiction of the lower court does not exceed Kshs.3,000,000.00.

The proceedings before the court in this cause take the form of matrimonial cause and not a civil suit. The law governing the cause is the Matrimonial Causes Act and Rules; the Civil Procedure Act and Rules are therefore of no application. Onyancha J, while handling a Matrimonial Cause in *Shah -vs- Shah* (number 2) (2002) 2KLR 607, held that where any proceedings are governed by a special legislation, the powers of the special legislation must be strictly construed and applied and that the provisions of the Civil Procedure Act and Rules to not apply, unless they are specifically provided for by such special legislation and the position remains the same even if the special legislation is silent about and does not exclude the Civil Procedure Act and Rules.

The effect of this is that ***Section 11*** of the Civil Procedure Act is not relevant to proceedings commenced under the Matrimonial Causes and Rules. It follows from this that the issue of pecuniary jurisdiction is not material to matrimonial proceedings.

The petitioner's argument that the Motion dated 1st March 2012 is brought under the provisions of the Constitution, and the lower court has no power to interprete the Constitution does not help her case. The preliminary objection is raised to the suit and not the Motion. The petition dated 1st March 2012 is not founded on the Constitution. Indeed, it does not express itself to be brought under any provisions of the law. The said petition is not a constitutional application or reference. It does not raise constitutional issues that require interpretation by the court. I find no merit in the petitioner's argument in this respect.

The other objection is that the suit is incompetent and fatally defective. The respondent has not, in this written submissions, identified the alleged defects. He does not at all address this objection. Consequently, I will not dwell on it.

The petitioner cites *Mukisa Biscuits Manufacturing Company Ltd -vs- West End Distributors Ltd* (1969) E.A. 696 on preliminary objections, where the court said:

> ***"A preliminary objection is in the nature of what used to be a demurrer It raises as pure point of law which is argued on the assumption that all facts pleaded by the other side as correct. It cannot be raised if any fact has to be ascertained....The improper raising of points of law does nothing but unnecessarily increase costs and on occasion confuse issues. This improper practice should stop."***

The petitioner does not say that the respondent's preliminary objection is improper but the implication from the citing of the decision in *Mukisa Biscuits Manufacturing Company Ltd -vs- West End Distributors Ltd* is clear. My view is that lack of jurisdiction is an objection that ought to be taken at the preliminary stages of a case. Where there is no jurisdiction, there would be no point for the court to start hearing a matter. To that extent the objections in this case was raised at the right stage of the proceedings and it raises pure points of law and merited being entertained by the court.

I find that the preliminary objection raised is merited for the reasons I have given above. I hereby allow the objection on grounds of lack of jurisdiction. The petition dated 18th March 2012 is hereby struck out with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 27th DAY OF JUNE 2013.

W. M. MUSYOKA

JUDGE