



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 55 OF 2011 (O.S.)

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

AND

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT (1882)

S A M.....APPLICANT/PLAINTIFF

VERSUS

P M M.....DEFENDANT/RESPONDENT

RULING

The parties herein contracted a statutory marriage on 7th June 1980 at the Registrar's Office at Nairobi. It would appear that marital relations soured along the way. The said marriage was dissolved on 1st November 2010 in Milimani Commercial Courts Divorce Cause No. 100 of 2010. The divorce proceedings were initiated at the instance of the plaintiff herein, the former wife of the defendant.

Following the pronouncement of the decree *nisi*, the plaintiff moved this court on 18th October 2011; vide an Originating Summons dated 17th October 2011, seeking division of matrimonial property. She simultaneously filed a Motion dated 17th October 2011 asking for temporary injunctive orders to restrain alienation of the property the subject of the Originating Summons. She would also like to have an order that the rental incomes from some of the properties be held in a joint account pending the hearing and determination of the suit.

The property the subject of the application includes Plot No. [particulars withheld] **Section 2** Umoja Innercore, LR No. Nairobi Block [particulars withheld] Jamhuri Estate Nairobi, Plot No. [particulars withheld] Mumias Site and Service Scheme, LR South [particulars withheld], Musanda-Mumias which the matrimonial home upcountry stands, 5 acres of land in Matuga, Kwale, a plot of land in Kwale town, a beach plot in Bamburi Mombasa and a plot of land in Likoni, Mombasa. No documentary proof has been presented to show that these assets exist. There is only one annexure which suggests existence of a property, being Buru Buru [particulars withheld] Phase 5, which is in the names of both parties. This property is not in the applicant's list.

In his reply, through his affidavit sworn on 24th November 2011, the respondent states:

- a. That Buru Buru Block [particulars withheld] Phase 5 was acquired by the plaintiff through employment, but he contributed to both its acquisition and development;
- b. That Plot No. [particulars withheld] **Section 2** Umoja Innercore does not belong to the parties, but

- to a limited liability company known as [particulars withheld] Limited. He has exhibited an assignment relating to this property to support his claim;
- c. That LR No. Nairobi Block [particulars withheld] Jamhuri Estate Nairobi was acquired and developed by himself from his own resources;
 - d. That LR South [particulars withheld] does not belong to him, but rather to a F K W. He has exhibited an official search dated 7th November 2011 demonstrating the registration in favour of Mr. W and the fact that there is a charge registered against the title;
 - e. That Plot No. [particulars withheld] Mumias Site and Service Scheme has been repossessed by the relevant local authority over unpaid rates;
 - f. That Musanda-Mumias, whose actual description is [particulars withheld] is registered in the joint name of the defendant and a R A M, and it is here that the matrimonial home stands;
 - g. That he does not own the properties in Mombasa whose title numbers have not been disclosed; and
 - h. That the plaintiff has several properties under her name and which were acquired through his direct and indirect contribution, namely LR [particulars withheld] and LR No. [particulars withheld] Municipality. He has exhibited documents of title to support this contention.

The plaintiff has not responded to the averments made in the affidavit by the defendant.

Both sides have filed written submissions to articulate their various arguments.

It would appear from the record before me that Buru Buru Block [particulars withheld] and LR No. Nairobi Block [particulars withheld] Estate Nairobi are in the names of either or both of the parties to the suit. It is common ground that they were acquired during coverture. Whether either party contributed to their acquisition is not a matter that I should address at this point. They ought to be preserved pending the hearing and disposal of the suit herein.

There several properties registered in the names of either of the parties and a third party. These include [particulars withheld] and LR No. [particulars withheld] Municipality. These are properties acquired during coverture and therefore a subject of interest in these proceedings. I note in particular that the rural matrimonial home of the estranged couple stands on [particulars withheld]. Whatever the nature of ownership of the said assets so long as either party has an interest in the same it would be just to preserve them pending the hearing and determination of the suit. It is up to the party who is registered as part owner to demonstrate at the main hearing that the other party has no interest whatsoever in the said assets.

Two of the assets are said to be registered in the names of other persons. LR South [particulars withheld] is said to belong to F K W, and there is documentary proof of this. The plaintiff has not disputed this. This property is therefore not available for the purpose of determining the plaintiff's share in it, and therefore there is no basis for granting injunctive orders with relation to it. Plot No. [particulars withheld] Umoja Innercore is registered in the name of a limited liability company, [particulars withheld] Limited. None of the two parties has attempted to demonstrate the connection between them and the company. I am not a handwriting expert, but looking at the signature of the defendant on his affidavit sworn on 24th November 2011 and that in the deed of assignment dated 23rd August 2000, annexed as PPM7 to the said affidavit, on behalf of [particulars withheld] Limited, I suspect that the defendant has something or other to do with the company. However, since the plaintiff has not dealt with this I will give the defendant the benefit of the doubt, and hold that I find no basis to make preservative orders in respect of this property.

LR [particulars withheld] is in the name of the plaintiff. According to annexure PMM13 in the affidavit of the defendant, this property was registered in favour of the plaintiff on 5th July 2011. This was after the divorce court had dissolved the marriage between the parties. Quite clearly the same was not acquired during coverture, and preservative orders ought not be made with relation to the same.

Plot No. [particulars withheld] Site and Service Scheme is said to have been repossessed following failure to pay outstanding rates. There is however no evidence to support this contention. What is exhibited to the application is a demand note for payment of rates over the said property. There is nothing to show that the said property was indeed sold.

The plaintiff has not presented any evidence that the Mombasa and Kwale exist. Court orders are not made in vain. Before the court can make preservative orders relating to property the subject of an application under **Section 17** of the Married Women's Property Act, 1882, it must be demonstrated that the property in question does in fact exist. This would mean that the said orders are not available with respect to the alleged Mombasa and Kwale properties.

In the end it is my finding that the following assets should be preserved by both parties pending the hearing and disposal of the suit herein, that is to say:-

- a. Buru Buru Block [particulars withheld],
- b. LR No. Nairobi Block [particulars withheld] Estate Nairobi,
- c. [particulars withheld],
- d. LR No. [particulars withheld] Municipality, and
- e. Plot No. [particulars withheld] Site and Service Scheme.

The said assets shall not be wasted, damaged, alienated, sold, transferred or otherwise detrimentally interfered with by either the plaintiff or the defendant pending the hearing and disposal of the Originating Summons herein dated 17th October 2011.

On the second limb of the application, prayer 4, which seeks deposit of the rental income, I find myself unable to give the orders sought as I have insufficient evidence before me to support the giving of the order sought. I will dismiss the application with respect to this prayer.

I am reluctant to award costs. A suit under section 17 of the Married Women's Property Act provides remedies for married women. I note that the marriage between the parties herein was dissolved on 1st November 2010. The certificate of decree nisi before me was issued on 7th February 2011. This suit was commenced on 18th October 2011. I do not know whether decree nisi had been made absolute by then. There are there issues concerning the competence of the suit in the circumstances.

SIGNED DATED and **DELIVERED** in open court this **26th** day of **September, 2013.**

W. MUSYOKA

JUDGE