



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

E.L.C NO. E035 OF 2021

EMW..... PLAINTIFF

VERSUS

RMKDEFENDANT

RULING

1. The Defendant filed the Preliminary Objection dated the 20/8/2021 on the grounds; that;

a. The Plaintiff herein has filed a Divorce against the Defendant being civil case No 257 of 2021 –Kiambu. The properties listed in the suit herein refer to the matrimonial property and thus this case is not properly before this Court and that the divorce matter is yet to be heard and determined in accordance with Section 6(1) and 7 of the Matrimonial Property Act 2013.

b. The suit is premature defective and bad in law as it offends the provisions of Section 17 of the Matrimonial Property Act, No 49 of 2013.

2. On the 3/11/2021 the parties appeared by the Court through their counsels on record and elected to canvass the Preliminary Objection by way of written submissions. The Court directed the parties to file and exchange written submissions within 30 days and in any event that all the written submissions be filed by 3/12/2021 and the Court reserved the ruling for the 18/1/2021.

3. As at the time of writing this ruling it is only the Defendant that filed written submissions. The Plaintiff did not comply with the Courts directions. On the face of it the objection is not contested. That said I will be guided by the party's pleadings on record in determining the objection.

4. The Defendant submitted that the suit offends the provisions of Section 17 of the Matrimonial Property Act (MPA). That the Plaintiff's interest in the suit lands flows from her marriage to the Defendant, which interest can only be determined upon the conclusion of the ongoing Divorce proceedings filed by the Plaintiff in **CMCC No 257 of 2021** in Kiambu. It was his argument that this Court has no jurisdiction to determine the matter in view of the ongoing divorce proceedings. That the key issues surrounding the inquiry are; whether the parties are spouses under Section 2 of the MPA and secondly whether the properties are matrimonial properties in accordance with Section 6 of the said Act.

5. The Defendant relied on the case of **Kobilo Chepkok Vs Francis Chepkok Tuwei (2018)eKLR** to show the proposition that the distribution of matrimonial property in a marriage that is yet to be dissolved is handled by the Family division of the High Court.

6. The single issue before the Court is whether the Preliminary Objection is a pure point of law. An affirmative finding to the issue will resolve the suit in its finality.

7. For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and thirdly, it cannot be raised if any fact has to be ascertained or fourthly if what is sought is the exercise of judicial discretion. Finally, a valid Preliminary Objection should, if successful, dispose of the suit. See **Mukhisa Biscuit Manufacturing Company Limited Vs West End Distributors Limited (1969) EA 696**.

8. Vide a plaint dated the 15/3/2021 the Plaintiff filed suit against the Defendant seeking interalia declaratory orders that the Plaintiff has beneficial interest in the properties namely Kiambaa/Ruaka/xxxx, Kiambaa /Thimbigua/ xxxx, Kiambaa/Thimbigua/ xxxx, Kiambaa/ Ruaka/xxxx, Kiambaa/Karura/ xxxx, House Nos xxxx, xxxx, xxxx, xxxx, xxxx and xxxx (the suit properties).

9. In his submissions the Defendant admitted that the parties in the suit are husband and wife having been married in 1984 under Kikuyu Customary law. That they separated in 2021 and the Plaintiff then filed a divorce in **MCC Cause No 257 of 2021** seeking the dissolution of the marriage. I find that the facts with respect to the marital status of the parties are commonly agreed.

10. The jurisdiction of this Court is being challenged. Jurisdiction of a Court is everything and once the Court makes a finding that it is devoid of it, it must down its tools at once and take no more step.

11. Article 162(2)(b) of the Constitution confers this Court with jurisdiction over disputes relating to the environment and the use and occupation of, and title to land. In addition, Section 13 of the Environment and Land Court Act expounds on the jurisdiction of this Court as follows:

“(1)The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.”

12. Section 2 read together with Section 6 of the MPA defines matrimonial home to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property; matrimonial property on the other hand means the matrimonial home or homes, household goods and effects in the matrimonial home or homes or any other immovable and movable property jointly owned or acquired jointly during the subsistence of the marriage.

13. In the case of **Sophy Njiri V National Bank of Kenya & Another (2015) eKLR** the Court held as follows:

“A spouse has a right to the matrimonial home, and if that right is threatened or is being affected by some action by another person, the spouse may apply to Court for relief”.

14. Where there is a dispute with respect to matrimonial property, Section 17 provides the procedure to be followed in agitating those rights. It says;

“(1) 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 of the person.

(2) An application under Sub-section (1)—

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made as part of a petition in a matrimonial cause; and

(c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

15. From the above provisions of the MPA it follows that the current legal position is that concurrent jurisdiction has been given to many Courts to hear disputes relating to matrimonial property. The Marriage Act of 2014 in addition provides that the Courts that will hear matrimonial causes arising under the Act are resident magistrate's Courts and within the limits provided under the law as to their jurisdiction. The High Court is in this regard granted original and unlimited jurisdiction in civil matters by the Constitution under Article 165(3). Equally this Court enjoys jurisdiction over matrimonial properties except where it involves matrimonial causes which is in the province of the High Court and the Magistrates' Court in line with their respective jurisdictions.

16. In this case the Plaintiffs claim revolves around division of property that she claims to be matrimonial property. For the Court to determine the case it must inquire as to the marital status of the parties. In this case the parties are still married but separated. The other issue is to determine which of the properties listed are matrimonial or not. Distribution of matrimonial property in an undissolved marriage is best left to the family Court.

17. The parties' divorce having been brought to the attention of the Court, it is my finding that the right forum for the parties to litigate on the

dispute in accordance with Section 17 (b) of Matrimonial Property Act is in the Probate Court. The Court with jurisdiction is the one that the suit in **MCC Cause No 257 of 2021** is pending.

18. From the forgoing I find that in the circumstances of this case the Preliminary Objection has merit and is therefore upheld.

19. This suit is hereby struck out with costs in favour of the Defendant.

20. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 8TH DAY OF FEBRUARY 2022 VIA MICROSOFT TEAMS PLATFORM.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Ms. Nganga holding brief for Kanyi for Plaintiff

Ms. Etole for the Defendant

Ms. Phyllis Mwangi – Court Assistant