JWH v WAH; EKM (Interested Party) (Matrimonial Cause E009 of 2023) [2024] KEHC 1930 (KLR) (1 March 2024) (Ruling)

Neutral citation: [2024] KEHC 1930 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MATRIMONIAL CAUSE E009 OF 2023

G MUTAI, J

MARCH 1, 2024

BETWEEN

JWH ..... APPLICANT

AND

WAH ..... RESPONDENT

AND

EKM ..... INTERESTED PARTY

RULING

1. Before this court is a Notice of Motion application dated 8th November 2023. Vide the said Application, the Respondent/Applicant seeks the following orders: -

    a. Spent;

    b. That this honourable court be pleased to stay proceedings in this suit pending the hearing and determination of Mombasa ELC Case No.60 of 2014;

    c. That in the alternative, and without prejudice to prayer two (2) above, this honourable court be pleased to issue an order admitting and/or joining Emily Karendi Mbogo as an interested party to these proceedings;

    d. That upon grant of prayer 3 above, this honourable court be pleased to grant leave to the interested party to file her pleadings and/or documents in relation to this cause;

    e. That in the alternative and without prejudice to prayer (2), (3) and (4) above, this honourable court be pleased to strike out the originating summons dated 1st August 2023 for being incompetent and an abuse of the court process;

f. That the honourable court be pleased to issue any better or further orders in the interest of justice and fairness; and

g. That the costs of this application be provided for.

2. The application is premised on the grounds stated in the body of the application and also in the supporting affidavit of the Respondent/Applicant and the Intended Interested Party, both sworn on 8th November 2023. She urged the court to stay the proceedings in this matter, awaiting the outcome of Mombasa ELC No.60 of 2014, as, in the event the two courts with equal status, gave different decisions, it would be embarrassing. It was urged that no prejudice will be suffered by the Applicant/ Respondent if the application is allowed.

3. The Intended Interested Party stated that before filing the case pending at the Environment and Land Court, she was the registered owner of the suit property Title No. Kiegoi/Kinyanka/1993 and that the Applicant/Respondent used to visit the same as a companion to her sister, the Respondent/ Applicant. She deposed that the suit property has never been a matrimonial property or home for either the Applicant/Respondent or Respondent/Applicant. She further deposed that the case before the Environment and Land Court was filed without her knowledge and that she was not served with pleadings in the said case. Her wish is to be added to these proceedings so that she can demonstrate her claim to the suit property.

4. In response, the Applicant/Respondent filed two Replying Affidavits, both sworn on 29th November 2023. He denied the contents of the supporting affidavit by the Respondent/Applicant and the Intended Interested Party. He stated that the interested party has been indolent in prosecuting the application before the ELC court and that the judgement of the ELC court is regular and proper, having been issued after hearing all the parties. He averred that he solely paid the purchase price for the suit property and had the suit property registered in the name of the Respondent/Applicant, to hold in trust for him. Thus, he is the sole lawful owner of the same.

5. He further stated that the Intended Interested Party colluded with the Respondent/Applicant to fraudulently transfer the suit property from the Respondent/Applicant to the Intended Interested Party in order to defeat his claim for matrimonial property. The suit property was bought during the pendency of his marriage to the Respondent/Applicant, and he proceeded to develop the property using his own funds. The interested party has no identifiable interest or claim to the suit property, and her inclusion in the proceedings would invite further mischief and defeat the purpose of the matrimonial proceedings.

6. He averred that the clause in the prenuptial agreement on jurisdiction cannot apply to immovable property located in Kenya, nor can any order/judgement issued by a German court be enforced in Kenya against immovable property in Kenya. He stated that the Respondent/Applicant had not established any ground for a stay of the matrimonial proceedings.

7. He further averred that the fact that the marriage was dissolved by way of divorce meant it was valid. Any further delays in the hearing and determination of this matter would invite further mischief by the Respondent/Applicant and defeat the purpose of the matrimonial proceedings.

8. He stated that the application is fatally defective and ought to be struck out with costs.

9. He also filed Grounds of Opposition dated 15th November 2023, raising the following grounds; that the application has been brought with unreasonable delay and the respondent is guilty of laches; that the Respondent /Applicant has delayed prosecuting its Notice of Motion dated 26th June 2023, with directions issued in the Respondent/Applicant's absence; that to strike out the originating summons

is draconian and will unjustly deny the Applicant/Respondent access to justice; that the Respondent / Applicant has no basis in law to apply to enjoin the intended interested party in the suit; that it has not been shown that the Intended Interested Party has an identifiable legal interest in the matrimonial property; that the Intended Interested Party's presence is not necessary for this court to adjudicate on the matrimonial claims between the parties; that the Applicant/Respondent stands to suffer prejudice by continued delay of the proceedings by the Respondent/Applicant; that the alleged pre-nuptial agreement does not apply to the matrimonial property herein. The German Court has no jurisdiction over immovable property situated within the Republic of Kenya; and that the application is frivolous and an abuse of the court process, deliberately filed late to delay the hearing of the main suit and also that the application is bad in law and ought to be dismissed with costs to the Applicant/Respondent.

10. The Respondent/Applicant filed a further affidavit sworn on 22nd December 2023 in response to the replying affidavit by the Applicant/Respondent. She denied the allegations by the Applicant/Respondent. She stated that her counsel only missed court on 2nd November 2023 before the Environment and Land Court as the date was not convenient and was taken by a counsel holding brief.

11. She stated that there is no dispute on citizenship and validity of the pre-nuptial agreement, which the Applicant/Respondent has used in his favour, both in Kenya and in Germany. That valid foreign judgements are enforceable in Kenya by virtue of Section 9 of the *Civil Procedure Act*, and that being German citizens, nothing bars the German courts from determining all issues arising out of a void marriage.

12. Further, there is no dispute on the existence of proceedings before the land court, and reversal of the suit property to her may take place. She stated that there was no mischief on her end and urged the court to strike out the entire claim.

13. The Interested Party filed a further affidavit sworn on 22nd December 2023. She reiterated the contents of her supporting affidavit and stated that she has been keen on prosecuting her application to set aside the judgment. She argued that the suit property is neither a matrimonial home nor matrimonial property.

14. She stated that she did not collude with the Respondent/Applicant to have the property transferred to her as alleged. As a person whose title was cancelled by the court, she has a right to be enjoined to these proceedings to lay a claim or shed light on the ownership of the property.

15. She denied having been duly served with court pleadings in the land case and that the court proceeded to cancel her title on the misguided believe that she was served. She urged the court to allow the application to enjoin her as a party to the proceedings.

16. The Respondent/Applicant, through her advocates Ngunjiri Michael & Co. Advocates, filed written submissions dated 27th December 2023. Counsel submitted on two issues: whether the application dated 8th November 2023 is merited; if it is in the affirmative; whether the application has merits and ought to be allowed; and who should cater for the costs of the application.

17. On the first issue, counsel relied on Order 1 Rule 10, Order 2 Rule 15 of the Civil Procedure Rules, 2010 and submitted that their application is well grounded in law.

18. Counsel urged the court to strike out the Originating Summons for lack of jurisdiction and allow the application.

19. The Applicant /Respondent through his Advocates, Mwashushe & Company Advocates, filed written submissions dated 17th January 2024. Counsel submitted on four issues for determination, namely, whether or not these proceedings should be stayed, whether or not the intended party should be

enjoined to the suit, whether or not the originating summons should be struck out, and who should bear the costs of the application.

20. On the 1st issue, counsel submitted that the court is guided by article 159 (2)(b) of *the constitution* and Rule 3 of the Matrimonial Property Rules, 2022, to avoid delay and expedite the resolution of disputes relating to matrimonial property. This suit was commenced following leave granted in Miscellaneous Case No.46 of 2022 via a ruling delivered on 14th July 2023, which the Respondent/Applicant has not appealed and or applied for review against. The application herein was filed after the closure of the pleadings. Further, the Respondent/Applicant has been indolent in prosecuting the application before the land court by not complying with court directions and not attending court sessions, and to grant a stay in this matter would only embolden the Respondent/Applicant to continue with her indolence and deny the Applicant/Respondent his right to be heard.

21. Counsel further submitted that the Respondent/Applicant and the Intended Interested Party were duly served with pleadings in the matter pending before the land court. The decree of the court was registered against the suit property on 13th December 2018, and thus, the Respondent/Applicant and Intended Interested Party had sufficient notice. The application before the land court is an afterthought filed to stop these matrimonial proceedings.

22. Counsel submitted that the stay sought herein is an attempt to circumvent the jurisdiction of the land court. The application is not properly grounded in law, so the stay orders should not be issued.

23. On the second issue, the counsel submitted that the Intended Interested Party has no identifiable or lawful interest in the suit property. Counsel referred to paragraph 18 of the Intended Interested Party's Replying Affidavit dated 1st February 2023 and submitted that the inclusion of the interested party is meant to introduce false and contradictory allegations that would not enable this honourable court to reach a just determination.

24. On the third issue, counsel submitted that the Respondent/Applicant did not concede to the validity of the alleged pre-nuptial agreement, which is to be tested during trial. Counsel urged the court to exercise its discretion judiciously. That the exclusive jurisdiction clause cannot oust the jurisdiction of this honourable court as it is inconsistent with Section 3(3)(d) of the Foreign Judgements (Reciprocal Enforcement) Act, which expressly excludes judgements and orders on questions on matrimonial property issued by a foreign court and therefore any decision made by a German court on the suit property is not recognisable in Kenya. This court has unlimited original jurisdiction under Article 165 of *the constitution*, and it ought not to cede its jurisdiction and Kenya's territorial sovereignty to a foreign court whose orders are not recognisable or enforceable under Kenya's laws.

25. Counsel further submitted that the allegation that the marriage was void is misplaced as the decree absolute dated 23rd January 2018 has not been appealed against or set aside, nor has its validity questioned. That the same ought to have been dealt with in the divorce proceedings and not these proceedings.

26. Counsel submitted that striking out the suit is a draconian measure, whereas there is no substantive reason to strike out the same.

27. On the fourth issue counsel submitted urged the court to exercise its discretion and award the Applicant/Respondent costs.

28. When the matter came for the highlighting of the written submissions on 29th January 2024, both counsels reiterated the position of the parties in their affidavits and written submissions.

29. I have considered the application, the responses therein and the rival submissions by both counsels and the issues coming for determination in my view are:-

    a. Whether this court has jurisdiction to hear and determine this application and the main suit;

    b. Whether the originating summons dated 1st August 2023 should be struck out;

    c. Whether the Intended Interested Party should be joined into these proceedings; and

    d. Whether the proceedings before this court should be stayed pending the hearing and determination of Mombasa ELC Case No. 60 of 2014.

30. On whether this court has jurisdiction to determine the dispute between the parties, the Respondent/Applicant has argued that they are both German citizens and not Kenyans and that they have a pre-nuptial agreement that states that the court with jurisdiction to determine any disputes between them will be the German courts.

31. On the other hand, the Applicant/Respondent has argued that he has not conceded to the validity of the alleged agreement and that the same cannot oust the jurisdiction of this court to hear and determine the suit. That the clause is inconsistent with Section 3 (3)(d) of the Foreign Judgements (Reciprocal Enforcement) Act which excludes judgements and orders on questions on matrimonial property issued by a foreign court.

32. In dealing with the issue of jurisdiction Nyarangi, JA in the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR stated:-

> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

33. Further, The Supreme Court, in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR stated:-

> "A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with the counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings."

34. From the above cases, it is evident that a court's jurisdiction flows from either *the Constitution* or legislation. In this case, the High Court derives its jurisdiction from Article 165 of *the Constitution*, which gives it unlimited original jurisdiction in criminal and civil matters. The jurisdiction of the High Court, flowing as it does from *the Constitution*, cannot be ousted by a clause in an agreement between parties. Therefore, I cannot agree with the Respondent/Applicant's submission that the Family Court lacks jurisdiction. The prayer to that effect, therefore, fails.

35. On whether the Originating Summons dated 1st August 2023 should be struck out, Counsel submitted that if this suit is allowed to proceed, it may embarrass this honourable court.

36. In dealing with striking out of a suit, the court in the case of Zainab Abdalla Nooman & another v Public Trustee [2016] eKLR stated:-

> " It is trite law that the striking out of any suit is a drastic and draconian measure which Courts are loathe to apply unless a suit is found to be so hopelessly incompetent that no life can be breathed into it. The Court of Appeal in the case of DT Dobie & Company (Kenya) Ltd vs. Muchina [1980] eKLR while considering the principles of striking out cases rendered itself thus-
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> > "No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of the case before it."
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> Madan JA (as he then was) adopted the following finding of Danckwerts, L. J. in Nagle v. Fielden (1966) 2 Q.B.D. 633 at p. 646.
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> > "The summary remedy which has been applied to this action is only applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the court."
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> In the same case at p. 651 Salmon, L.J., delivered himself thus
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> > "It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable. Accordingly it is necessary to consider whether or not this plaintiff has an arguable case. That is the only question that arises on this appeal."
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> > ... Although no Grant of Letters of Administration has been produced before this Court, the entries in the copy of title raise sufficient questions. These questions can only be answered at a full hearing of the Originating Summons at which point the trial Court shall determine whether or not a reasonable cause of action has been disclosed. It is the view of this Court that there are issues herein which are fit to go for trial and the Plaintiffs should not be driven from the judgement seat thereby depriving them of their right to have their suit determined in a full trial. Consequently, the Application herein is dismissed. Costs shall be in the cause."

37. The above holding appears to be in all fours with this matter. It is also my view that the issues raised by the parties herein are issues that can only be answered at a full hearing. Therefore it will not be in the interest of justice to strike out Originating Summons at this stage.

38. On whether the intended interested party should be joined into these proceedings, the court in the case of Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff) [2022] eKLR stated:-

> " The relevant tests for determination whether or not to join a party in proceedings were restated by Nambuye, J (as she then was) in the case of Kingori vs. Chege & 3 Others [2002]

2 KLR 243 where the learned Judge stated that the guiding principles when an intending party is to be joined are as follows:

1. He must be a necessary party.
2. He must be a proper party.
3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
4. The ultimate order or decree cannot be enforced without his presence in the matter.
5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit."

39. The reasons advanced for the joinder of the Intended Interested Party are based on the ownership of the suit property, which falls under the jurisdiction of the Environment and Land Court. This being a matrimonial suit, the Intended Interested Party is not a necessary party; her joinder would delay the fair trial of this matter. In my view, her application does not meet the test for issuance of orders in her favour.

40. On whether the proceedings before this court should be stayed, the court in the case of Kenya Wildlife Service v James Mutembei [2019] eKLR stated:-

> " Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent. See Ringera J in the case of Global Tours &Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000 persuasively stated thus;
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> > "As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously" (emphasis added)."

41. The Respondent/Applicant argued that there being a pending suit concerning the same suit property Mombasa ELC No. 60 of 2014, these proceedings should be stayed to await the outcome of the case before the ELC court. My understanding of the matter before the land court is that there is a judgment in favour of the Applicant/Respondent that the Respondent/Applicant is trying to set aside. I have no way of knowing if the application made by the Respondent/Applicant will be successful. I do not think it would be prudent and judicious of this court to issue orders founded on a speculation. In any event stay of proceedings is a drastic remedy that should be available only in respect of the clearest and most deserving of cases.

42. The upshot of the foregoing is that the application before me has no merit. The same is dismissed. The matter is to proceed to a hearing on merits.

43. This being a family matter each of the parties herein will bear own costs.

44. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 1ST DAY OF MARCH 2024.

GREGORY MUTAI

JUDGE

In the presence of:-

Ms. Mwashushe for the Applicant/Respondent;

Ms. Karambu for the Respondent/Applicant; and

Arthur – Court Assistant.