



REPUBLIC OF KENYA



KENYA LAW
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**EGK v JMM (Divorce and Matrimonial Cause 7 of 2020)
[2023] KEHC 947 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 947 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
DIVORCE AND MATRIMONIAL CAUSE 7 OF 2020
LM NJUGUNA, J
FEBRUARY 15, 2023**

BETWEEN

EGK PETITIONER

AND

JMM RESPONDENT

RULING

1. The matter for determination before the court is an application dated July 19, 2022 wherein the applicant has sought for orders that:
 - i. Leave be granted to amend the petition.
 - ii. The annexed amended petition be deemed as duly filed and served upon payment of the requisite court fees.
 - iii. There be no orders as to cost.
2. The application is premised on the grounds on its face and further supported by the affidavit of EGK .
3. The application is based on the grounds that there is need for the pleadings to be amended to enable this court conclusively deal with the matter before it, that no prejudice shall be suffered by the respondent if the application herein is allowed and it is in the interest of justice that the same be allowed.
4. The respondent in opposition filed a replying affidavit sworn on October 21, 2022 and vehemently opposed the application herein citing reasons that the application as filed does not disclose any reasonable grounds to warrant issuance of the prayers sought. That the amended petition seeks to amend facts and evidence as previously alluded to by the petitioner in mischievous bid to seal her loopholes. It was deposed that the proposed amendments seek to introduce a new and inconsistent cause of action which would change the action into one of a substantially different character that can only be subject to a fresh suit. Further, that this court's jurisdiction to issue the orders sought has not



- been properly invoked under Rule 14 of the *Matrimonial Causes Rules*. He deposed that he stands greatly prejudiced if the prayers sought herein are allowed and therefore urged this court to dismiss the application herein.
5. The court gave directions that the application be canvassed by way of written submissions and both parties complied with the directions.
 6. It was submitted that the amendments sought herein are meant to correct errors on the parcels of land, separate the divorce cause from the matter of division of matrimonial property as well as indicate the circumstances of the marriage. Reliance was placed on Order 8 rule 3 of the *Civil Procedure Rules* and further, Order 8 Rule 5 on amendment of pleadings. The petitioner relied on the cases of *Institute for Social Accountability & Another Vs Parliament of Kenya & 3 Others* [2014] eKLR and *Elijah Kipng'eno arap Bii Vs Kenya Commercial Bank Limited* [2013] eKLR. It was submitted that the powers of the court to allow amendment is to determine the merits of the case; that they should be timeously applied for; power to amend can be exercised by the court at any stage of the proceedings; that as a general rule, however late, the amendment sought to be made should be allowed if made in good faith provided costs can compensate the other party.
 7. The respondent on the other hand submitted that the amendment sought introduces a new cause of action in that previously, the applicant had claimed that she was married under the Kiambu Customary Marriage to a new claim that there be a presumption of marriage owing to prolonged cohabitation. That the petitioner having claimed that they got married under Kiambu Customary marriage, she is therefore estopped from claiming otherwise. It was contended that the fact that it took two years for her to notice such a huge misrepresentation of facts if indeed the same is factual, the same demonstrates that the petitioner is on a fishing expedition. The respondent relied on the case of *Dahir Sadik AUSAAD Vs Modogashe Construction Ltd & 3 Others* [2016] eKLR. It was submitted that the application herein has been necessitated by the petitioner's desire to give her advocates a more arguable case. Further reliance was placed on the case of *O.E.O. v F.T.* [2010] eKLR. The respondent thus urged this court to dismiss the application herein with costs.
 8. I have considered the application herein, the response by the respondent and the written submissions by both parties. I find that the main issue for determination is whether the application is merited.
 9. The Application herein is majorly brought under Order 8 Rules 3 of the *Civil Procedure Rule*. For purposes of the ruling, it is important to duplicate the said provisions:
 - (1) Subject to Order 1, Rules 9 and 10, Order 24, rules 3, 4, 5, and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
 10. Further, Order 8, rule 5 gives the court the general power to amend.
 5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.
 11. In the case of *Central Kenya Limited Vs Trust Bank Limited & 5 Others* [200]e KLR the Court of Appeal (Gicheru, Bosire & Owuor, JJA) whilst referring to commentaries on the Indian Civil Procedure Code by Chittaley and Rao stated as follows with regards to amendment of pleadings:

“... that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been



no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

12. Their Lordships went on to state that:

“It is also trite law that as far as possible a litigant should plead the whole of the claim which he is entitled to make in respect of his cause of action. Otherwise the court will not later permit him to reopen the same subject of litigation (see O.II rule 1 of the Civil Procedure Rule) only because they have from negligence, inadvertence or accident omitted that part of their case. Amendment of pleadings and joinder of parties is meant to obviate this. Hence the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs (see, *Beoco Ltd v. Alfa Laval Co. Ltd* [1994] 4 ALL ER. 464).”

13. In the case of *City Clock Limited v County Clock Kenya Limited & Another* [2020] eKLR the court referred to a Court of Appeal decision in the case of *Ochieng’ and Others v First National Bank of Chicago* Civil Appeal Number 149 of 1991 [1995] eKLR which was cited with approval in *St. Patrick’s Hill School v Bank of Africa LTD* [2018] eKLR where the Court of Appeal set out the principles under which courts may grant leave to amend the pleadings. They were enunciated as follows:

- a. The power of the court to allow amendments is intended to determine the true substantive merits of the case:
- b. The amendments should be timeously applied for;
- c. Power to amend can be exercised by the court at any stage of the proceedings;
- d. That as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side:
- e. The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.

14. It is clear from the above that leave to amend pleadings should be granted freely so long as the amendment will not occasion injustice to the other side, and that there is no injustice if the other side can be compensated by way of costs. Further, the Party coming to court should make the application without undue delay.

15. But in this case, could the sought orders be issued given the circumstances herein? A perusal of the amended petition amended on July 19, 2022, reveals that the petitioner herein seeks inter alia for orders that this court makes a declaration that there exists a presumption of marriage between the parties; and thereafter, the same alleged marriage be dissolved and a declaration that the listed properties therein be declared as matrimonial properties; and the same be divided amongst the parties herein.

16. Section 17 of the *Matrimonial Property Act* reads that:

- 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 subsection (1)
 - a) shall be made in accordance with such procedure as may be prescribed.
 - b) May be made as part of a petition in matrimonial cause; and
 - c). May be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.
17. The above provision informs the fact that this court has jurisdiction to make declarations in so far as the interest in the property during the pendency of a marriage is concerned. The issues of distribution of the property would then only be determined upon dissolution of a marriage. In the instant case, that is not the position given that this court has been invited to make a declaration that there exists a presumption of marriage between the parties; and thereafter, the same alleged marriage be dissolved and a declaration that the listed properties therein be declared as matrimonial properties; and the same be divided amongst the parties herein.
18. In the case of *E.N.N. v S.N.K.* [2021] eKLR, Kemei J held the view that a matter that regards the division of matrimonial property ought to have the following proven by either of the parties:
 - i. The fact of a valid, legal, regular marriage in law;
 - ii. Dissolution of the marriage by an order of the Court;
 - iii. That the listed property constitutes matrimonial property; acquired and developed during the subsistence of the marriage; and
 - iv. Contribution by each party to the acquisition or development. [Also see Court of Appeal decision in *AKK v PKW* [2020] eKLR]
19. Musyoka J. in *P.O.M v M.N.K* (2017) eKLR stated that:

“This is a suit for division of matrimonial property...The prerequisites are that the parties ought to have been in a marriage, to have had acquired matrimonial property during coverture and for their marriage to have been dissolved as at the point orders on division of matrimonial property are being made...”
20. As already indicated above, this court is possessed of jurisdiction to make orders in relation to any matrimonial property. In the instant case, the petitioner alleges existence of a marriage which has not even been proved; but even assuming that there was a marriage, the same has not been dissolved and therefore the orders sought in relation to the listed properties in the amended petition cannot therefore issue.
21. In the premises therefore, this court reaches the following determination that:
 - i. The application dated July 19, 2022 is hereby dismissed with costs to the respondent.
22. It is so ordered.

DELIVERED, DATED, AND SIGNED AT EMBU THIS 15TH DAY OF FEBRUARY 2023.

L. NJUGUNA

JUDGE

.....for the Petitioner/Applicant



.....or the Respondent

