



REPUBLIC OF KENYA



**EJ v JKN (Matrimonial Cause 4 of 2020) [2023] KEHC 23725 (KLR) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23725 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MATRIMONIAL CAUSE 4 OF 2020  
HM NYAGA, J  
OCTOBER 18, 2023**

**BETWEEN**

**EJ ..... APPLICANT**

**AND**

**JKN ..... RESPONDENT**

**RULING**

1. This ruling relates to Notice of Motion dated 18<sup>th</sup> September, 2023 brought under Order 50 Rule 1 of the *Civil Procedure Rules*, Sections 1A, 1B and 3A of the *Civil Procedure Act* wherein the Applicant is seeking to reopen the case to allow the Report by Kenya Forest Service to be produced as part of evidence in this case.
2. The Application is premised on grounds that the Applicant will be greatly prejudiced if the report by the Kenya Forest Service is not produced; that the Respondent is on a harvesting spree to deny the Applicant any benefit from the sale of the harvested trees; and that the Respondent harvested trees on parcel No.108 Nyota Farm registered as Parcel Nakuru/Nyota Pendle/Tregana Scheme/108 which was reported to Keringet Police Station.
3. The Application is supported by an affidavit of the Applicant sworn on 18<sup>th</sup> September,2023. She avers that on 6<sup>th</sup> September,2023, the defendant called her stating that he was sending people to harvest trees that had remained after he had earlier harvested others and specifically informed her that she will face the consequences if at all she prevented the people he sent to harvest the same.
4. She deposes that on the same day, her worker called and informed her that some people had gone to the Shamba and were harvesting trees and threatening him. On receiving this information, she travelled to the ground the following day and confirmed the defendant's people were on the ground harvesting all the remaining trees and loading them into lorries.
5. It is her deposition that on 8<sup>th</sup> September,2023 she reported the issue at Keringet police station and she was issued with an occurrence book.



6. She states that she also wishes to produce the Judgement in Nakuru Chief Magistrate’s Divorce Cause No. 157 of 2022 and prayed that in the interest of justice this court should reopen the case to allow her produce the forester’s report and the divorce cause judgement to avoid seeking the review of the judgement later upon discovery of new facts
7. The Respondent opposed the Application through his Replying Affidavit sworn on 20<sup>th</sup> September,2023. He avers that Application is misconceived, incompetent, mischievous, devoid of merit and meant to delay the matter further because the Applicant is in possession of the property whereas he is not, courtesy of a court order.
8. He depones that it is not possible to reopen the plaintiff’s case once the defendant has testified, to adduce more evidence unless there was an intention to adduce such evidence when the plaintiff testified but the plaintiff was unable to because of some reason.
9. He avers that the document being sought to be adduced by the plaintiff had not been filed before the matter was set down for hearing and neither had the plaintiff raised an issue regarding trees on the said land in her pleadings.
10. He disputed that he called the Plaintiff to inform her that he was sending people to the land to harvest trees and that he had cut down trees. He stated that there is no evidence to substantiate these assertions.
11. He contends that there is no reason for re-opening the Applicant’s case.
12. The Plaintiff/Applicant swore a further affidavit in response to the aforestated replying affidavit. She avers that she has no intention of delaying the matter.
13. It is her averment that she could not have brought the evidence of trees cutting before as the same happened after the close of the case and that if the application is not allowed she stands to be prejudiced as the value of the trees will not be captured in the judgement of this court.

### **Analysis & Determination**

14. The only issue that arises for determination is whether this court should reopen the plaintiff’s/Applicant’s case. The applicant states that this was necessitated by the alleged acts of the respondent, after the parties had closed their respective cases in the cause.
15. The principles governing an application such as that before the court are that the court needs to find out why the evidence was not adduced prior to the hearing of the case being closed. Re-opening will not normally be allowed if the failure to adduce such evidence was deliberate.
16. Needless to state, the decision whether or not to allow such an application is a discretionary one which must be exercised judiciously. While considering a similar application in *Samuel Kiti Lewa v Housing Finance Co. Of Kenya Ltd & another [2015]* eKLR Kasango J. stated:

“ 17. Uganda High Court, Commercial Division in the case *Simba Telecom –v- Karuhanga & Anor* (2014) Ughc 98 had occasion to consider an application to re-open the case for purpose of submitting fresh evidence. That court referred to an Australian case *SMith –versus- New South Wales* [1992] HCA 36; (1992) 176 CLR 256 where it was held:

“If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was



a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised.”

The Ugandan Court in the case SIMBA TELECOM (supra) held thus:

“I agree with the holding in the case of Smith Versus South Wales Bar Association (1992) 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently, even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not.” .....

The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated by inordinate and unexplained delay.”

17. The record shows that the case of the parties herein was heard on 14<sup>th</sup> June,2023 and after both parties had testified they closed their respective cases. On 20<sup>th</sup> September,2023 both parties appeared before me for confirmation that they had filed their submissions.
18. The instant application was precipitated by the alleged tree harvesting by the respondent on 6<sup>th</sup> September,2023. The Applicant contends that the respondent sent his people to cut trees in contravention of the court orders barring him from do so. She has annexed photographs showing felled trees and a copy of the Occurrence Book confirming that she reported the incident at Keringet Police Station. There is also a copy of the ELC order restraining the Respondent or his agents from entering, leasing or in any way dealing with plot 108 Nyota Farm on record.
19. The Applicant could not have filed the document in issue prior hearing of her case as the events complained of happened after the parties had closed their respective cases.
20. This case involves the division of the matrimonial property and it is my considered view that the said report is crucial and will assist this court in making its final orders. The Application is not intended to fill gaps in the Applicant’s evidence and the Applicant has expeditiously filed this Application upon learning of the events that allegedly occurred on the said date of 6<sup>th</sup> September,2023.
21. The respondent will not be prejudiced if the Applicant’s case is reopened as he will have a chance to cross examine on the documents in issue.
22. The Applicant has also sought to produce the judgment in Nakuru Chief Magistrate’s Divorce Cause No. 157 of 2022. At the time she testified the cause was still pending. It has now been finalised. The determination of the same is crucial in that the court can now make orders on the distribution of the property that it may deem to be matrimonial property.



23. The Petitioner/ Respondent is seeking the division of the matrimonial property. If the divorce cause was still pending, only a Declaration under Section 17 of the *Matrimonial Property Act* would have issued. Such a declaration is not necessarily pegged on the extinction of a marriage. The effect of this section is that the court can make a declaration with regard to the suit property even though the parties are still married or pending divorce.
24. However, by virtue of Section 7, this court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved. The position in law was set out in *AKK vs PKW [2020]* eKLR where the Court of Appeal stated as follows;

“A plain reading of Section 17 enables a spouse, subsistence of a marriage notwithstanding, to make an application for declaratory orders. It further states that that application may be made as part of a petition in a matrimonial cause and notwithstanding that a petition has not been filed under any law relating to matrimonial causes. It is our opinion that the divorce cause does not prevent a party from bringing an action for declaration of rights to property in the High Court under Section 17 of the Act. In *PNN vs. ZWN [2017]* eKLR, Waki, JA stated that:

An inquiry may thus made under section 17 and declarations may be issued, the subsistence of a marriage notwithstanding. As stated by Lord Morris of Borthy-Guest in *Petit vs. Petit [1970] AC 777*:

“One of the main purposes of the act of 1886 was to make it fully possible for the property rights of the parties to a marriage to be kept separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this in my view negates any idea that section 17 was designed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to title to property the question for the court was whose is this? And not to whom shall it be given?”

The above case demonstrates that a declaration under Section 17 of the Act is not necessarily pegged on the subsistence of a marriage. The effect of this section is that the court can make a declaration with regard to the suit property even though the parties are still married or pending divorce. It is our considered view that the High Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested. However, by virtue of Section 7, the High court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved. We find that the trial court was clothed with the requisite jurisdiction to entertain those aspects of the appellant’s prayers that did not involve the division of matrimonial property and the superior court was in error to limit its jurisdiction on the basis of the provisions of Section 7 of the Act.”

25. In my view the production of the judgment will only aid the parties to come to a definite conclusion of the matter between them. Without the conclusion of the divorce cause, this court has jurisdiction to grant any other order under the said Act save for an order under section 7 thereof. No prejudice will be suffered by any party by the production of the judgment. Given the apparent acrimony between them, it would be better to finalise all the issues between them sooner rather than later.



26. From the foregoing, I allow the Applicants case to be re-opened for the production of the Report by Kenya Forest Service and the judgment in the divorce cause. The respondent's case is also re-opened. He may file his own report to counter the report in question.
27. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 18<sup>TH</sup> DAY OF OCTOBER, 2023.**

**H. M. NYAGA,**

**JUDGE.**

In the presence of;

Mr. Langat for Respondent

Mrs. N. Njoroge for Applicant

