



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**MATRIMONIAL CAUSE NO. 2 OF 2018**

**AMM.....PLAINTIFF**

**VERSUS**

**JKM.....DEFENDANT**

**R U L I N G**

1. Before me is a Notice of Motion dated 12<sup>th</sup> March, 2021 where JKM, the applicant herein seeks the following orders or relief namely: -

That this Honourable Court do make a finding that the following properties were acquired solely by the applicant and without any direct and or indirect contribution from the Respondent before and during the subsistence of their marriage. The properties as follows: -

- a) Yatta xx/Kwa Vonza/ xxx (7.35Acres)
- b) Yatta xx/Kwa Vonza/xxx
- c) Yatta xx/Kwa Vonza/xxx (3.19 Acres)
- d) Yatta xx/Kwa Vonza/xxx (12.3. Acres)
- e) Yatta xx/Kwa Vonza/xxx
- f) Yatta xx/Kwa Vonza/xxx (8.4 Acres)
- g) Yatta xx/Kwa Vonza/xxx
- h) Motor Vehicle Registration Number KAS xxxx**

2. The applicant has based his prayers on the following grounds listed on the face of his application namely: -

- (i) That the main O.S. herein is unfounded and an abuse of court process.*
- (ii) That the respondent has no evidence that she contributed in any way either through monetary or non-monetary in acquiring all mentioned properties.*
- (iii) That this court on 17<sup>th</sup> September, 2020 issued directions on the Originating Summons.*
- (iv) That on 15/12/2020 after he had filed his response, the respondent filed notice to withdraw and that the notice to withdraw is yet to be adopted by this court.*
- (v) That the applicant now seeks the above declaratory prayers before the suit can be withdrawn and that he seeks the same pursuant to Section 14 (a) and 17(1) of the Matrimonial Property Act.*
- (vi) That the respondent has a tendency of withdrawing part-heard cases as she also withdrew Kitui High Court No. xxx of 2017.*

3. The applicant has supported the above grounds with undated affidavit annexed to his application where he has majorly reiterated the above grounds. The applicant faults the respondent for having a tendency of withdrawing suits against him without paying him costs.

4. He contends that his replying affidavit to the Originating Summons amounts to a defence and counter claim and is asking this court to proceed and hear him on that basis. According to him, divorce is a prerequisite to invoking of **Section 17 of Matrimonial Property Act**.

5. The respondent opposed this appeal through undated replying affidavit conceding that she has indeed withdrawn her suit. She avers that the decision to withdraw the suit was informed by the fact that she then had not obtained Decree Nisi or Decree Absolute, declaring her marriage to the applicant dissolved. She contends that she has now obtained the same and hence rendering this application unmerited. The respondent however filed no submissions despite service by the applicant.

6. This court has considered this application and the response filed by the respondent. It is evident that the applicant's supporting affidavit is undated contrary to the provisions of **Section 5 of Oaths and Statutory Declaration Act**. **Section 5 of the Statutory Declaration Act Cap 15** states as follows pertaining to the above;

**7. Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made. However, the provisions of Civil Procedure Rules under Order 19 rule7 of the Civil Procedure Rules provides: -**

**“The court may receive any affidavit sworn for the purposes of being used in any suit notwithstanding any defect or mis-description of the parties or otherwise in title or other irregularity in form thereof or any technicality. “The omission by the parties in respect to the date the affidavits were sworn is not fatal.”**

The Court of Appeal in **Peter Nyaga Muvake v Joseph Mutunga [2015] eKLR** stated as follows on an omission of a date on the jurat;

**“In this case the supporting affidavit, though signed by the deponent (applicant), and the commissioner for oaths, whose names are reflected in the jurat, it does not show the date when the oath was administered. The supporting affidavit was filed in court on 30<sup>th</sup> March 2015 without the date on which the oath was administered. It is patent that the date was inadvertently omitted. Did this render the affidavit defective? Article 159(1)(d) of the Constitution enjoins courts in exercising judicial authority to be guided by the principle that justice shall be administered without undue regard to procedural technicalities. The omission of the date in the jurat has not been shown to have been deliberate. It seems, ostensibly, to have been inadvertent. It was a human error. The affidavit was filed in support of the motion which was dated. The date the affidavit could bear could only be a date on or before the date of the filing in Court. The omission does not vitiate the substance of the affidavit. We are not inclined to hold that the affidavit is bad in law on account of the omission when it is plain to discern that the omitted date could be on or before the filing of the application.”**

On the basis of the above, despite the said anomalies, this court is inclined to overlook the defect pursuant to provisions of **Order 19 Civil Procedure Rules** and determine this application on the merits.

8. It is true that this court on 24<sup>th</sup> September, 2020 directed that the suit be set down for hearing and further directed parties to file affidavits of all witnesses intended to be called. The case was set down for mention on 19<sup>th</sup> October 2020 for compliance. On the said date the defence counsel informed this court that he had complied on his part but the plaintiff was said to be indisposed forcing this court to adjourn the matter to 25.1.2021.

9. On 25.1.2021 the present applicant's counsel attended court and notified it that he had received notice to withdraw the suit. He applied orally in court to have the listed properties in the Originating Summons to be declared as his. This court declined asking him to make a formal application which is now the subject of this ruling.

10. It is indeed true that **Order 25 Rule 1** allows a party to withdraw his/her suit without seeking leave of court, the provision however provides that a Plaintiff can only do so if the matter has not been set down for hearing. It is therefore not an absolute right. The provision provides as follows;

**“At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.”**

11. There are various ways in which the hearing of a matter is allowed to proceed. One way can be through oral hearing and the other way may be through canvassing the same by way of written submissions.

The matter was not ready for hearing as there was compliance on filing of documents/ pleadings by 25th January 2021. The case had not been set down for hearing. Therefore, the Respondent did not require leave of court to withdraw her case.

12. The Court of Appeal in **Beijing Industrial Designing & Research Institute vs. Lagoon Development Ltd (2015) eKLR** held as follows;

**“The above provision presents three clear scenarios regarding discontinuance of suits or withdrawal of claims. The first scenario arises where the suit has not been set down for hearing. In such an instance, the Plaintiff is at liberty, any time, to discontinue the suit or to withdraw the claim or any part thereof. All that is required of the Plaintiff is to give notice in writing to that effect and serve it upon all the parties. In that scenario, the Plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed.”**

13. The Respondent in her Affidavit of 23<sup>rd</sup> March 2021 indicated that the reason why she withdrew her matter was because she had not acquired an order dissolving her marriage to the Applicant. This order was eventually granted by the *Resident Magistrate's Court in Kitui Divorce Cause No 5 of 2018 on 9<sup>th</sup> September 2020*. According to her, her suit had no basis as their divorce was yet to be finalized.

14. This contention is however mistaken because a closer look at the prayers sought by the Respondent in her undated application but filed on 20<sup>th</sup> May 2018 reveal that she was seeking a variety of orders including a declaration of entitlement to a share and compensation in respect of matrimonial property. This court has jurisdiction to adjudicate over the same by virtue of **Section 17 of the Matrimonial Property Act** whether their divorce had been finalized or not. The section provides for the jurisdiction of courts on matters touching on matrimonial property as follows;

***“(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 a matrimonial cause; and***

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

15. The Court of Appeal discussed the jurisdiction of the High Court with regards to declaration of rights of spouses' in matrimonial property in **AKK v PKW [2020] eKLR** as follows:

***Whilst the respondent argued that the suit offended Section 7 of the Matrimonial Property Act, 2013 on the basis that the remedy sought for division of property was not available until divorce or dissolution of marriage, the appellant, relying on Section 17 of the same Act argued that the court is not limited in respect to the declaration of rights of a spouse's interest in matrimonial property. Section 7 states:***

***“... ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”***

***Section 17 states that:***

***“(1) A person may apply to a court for declaration of rights to any property that is contested between that person and a spouse.***

***(2) An application under subsection (1) –***

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

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

***Section 7 refers to division of matrimonial property whilst Section 17 refers to a declaration of rights in any property contested between a person and a spouse. It can be discerned from the appellant's pleadings in the High Court that she sought not only division but also orders from the court that the listed property was matrimonial property and a further finding that she had proprietary and pecuniary interests in the same. The trial court found that it had no jurisdiction under Section 7 to make orders as to the division of property. It is also correct that the orders concerning division of matrimonial property pursuant to Section 7 of the Matrimonial Property Act was unavailable to the appellant until the determination of Divorce case 867 of 2017 between the parties hereto. However, in view of the order sought by the appellant extensively detailed above, it cannot categorically be said that the appellant's prayers fell solely within the ambit of Section 7 of the Act. It is our opinion that the learned Judge erred in limiting the court's jurisdiction to the provisions in Section 7 of the Act. In failing to address itself to the nature of reliefs sought by the appellant and the enabling provisions under Section 17 of the Act, the trial court did not proceed to determine whether the appellant satisfied the provisions under Section 17 of the Act in order for the court to make the declaratory orders sought.....***

***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.***

***In our opinion, the trial court had 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.....”***

16. Be it as it may, it is undeniable that the Respondent in this application essentially withdrew her suit herein on 8<sup>th</sup> December 2021 which means that technically there is no suit pending notwithstanding that there is no formal order adopting the withdrawal of the suit.

17. The provisions of **Order 25 Rule 1 of Civil Procedure Rules** of the Plaintiff has the liberty to withdraw his/her suit before the matter is set down for hearing. The Rule provides: -

***“At any time before the setting down of the suit for hearing the plaintiff may by notice in writing wholly discontinue his suit against all or any of the defendant or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.”***

18. The Respondent herein, was within her right to file her Notice of withdrawal of suit against the defendant applicant dated 8<sup>th</sup> December, 2020 which was filed on 8<sup>th</sup> December, 2020. The suit herein had not been set down for hearing because all the parties had not complied with the directions given by this court on 24<sup>th</sup> September 2020.

19. Having found that the applicant had a right to withdraw her suit, notwithstanding that she may have been mistaken on a point of law, it is clear that the applicant's only recourse is only a question of costs.

The prayers sought in this application in my view are not in good faith because they seek final declaratory orders on property rights without the benefit of full trial. The reliefs will not meet the ends of justice.

The applicant has claimed that the respondent has tendency to file suits against him before they are heard but if there is any mischief (which has not been established herein because no evidence has been laid before me to prove the allegations) then an order of costs will adequately address the mischief.

In the end, this court finds no merit in the application dated 12<sup>th</sup> March 2021. The same is dismissed but shall not make no order to costs.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**