



**ZAS v MKO (Family Originating Summons E005 of 2023)  
[2024] KEHC 15793 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15793 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
FAMILY ORIGINATING SUMMONS E005 OF 2023  
RE ABURILI, J  
DECEMBER 5, 2024**

**BETWEEN**

**ZAS ..... APPLICANT**

**AND**

**MKO ..... RESPONDENT**

**JUDGMENT**

1. By Originating Summons dated 2<sup>nd</sup> October 2023 the applicant ZAS sought the following orders:
  - a. A declaration that the applicant has an overriding interest in the property at issue; Land Parcel Kisumu/Kasule/3655
  - b. An order do issue prohibiting on a permanent basis, the defendant, his agents, proxies, and or anyone acting on his behalf from evicting the plaintiff, harassing her in any way, and or taking any action that may dispose of, encumber, and or interfering with occupation and status of Land Parcel Kisumu/Kasule/3655.
  - c. That a permanent injunction be issued prohibiting the defendant from accessing Venmar School, transferring teachers, dismissing them, becoming involved in its management in any capacity, operating or accessing the school account number held in all banks in any capacity, taking loans, withdrawing cash, and/or becoming involved in any capacity in matters pertaining to Venmar School.
2. It was the plaintiff’s case that she and the defendant had been married and living together since 2010 but that the defendant left the matrimonial home, abandoned her and threw her out of her own business and further, that he was in the process of selling the matrimonial home without her consent.
3. The plaintiff further averred that the defendant had unlawfully appropriated Venmar School and was negotiating economic loans with banks under the school’s name and was also mistreating and expelling



teachers without justification thus causing her harm as the rightful proprietor of the aforementioned school.

4. It was the plaintiff's case that the defendant had dispatched thugs who had threatened to beat her and evict her from the marital residence, which residence was purchased and constructed by both of them.
5. The plaintiff testified in support of her case adopting her supporting affidavit sworn on the 10<sup>th</sup> October 2023 and supplementary affidavit sworn on the 9<sup>th</sup> October 2023 as her evidence in chief. She also produced the documents annexed therein as P Exh. 1 – 17.
6. In cross-examination, the plaintiff reiterated that she was married to the defendant through customary marriage and that the defendant had paid dowry to her parents. It was her testimony in cross-examination that she contributed financially to the purchase of the suit land upon which the school, Venmar School was built. The plaintiff reiterated that she was the owner of Venmar School but that both she and the defendant were directors of the school.
7. She further testified that the defendant had changed the name of the school from Venmar to Hampshire. She further testified in cross-examination that she is only interested in the property of Venmar School and not the suit land where it is located as the defendant had taken out a loan on it. The plaintiff denied being a tenant on the suit land and that if a tenancy agreement existed it was a forgery. She denied the defendant's allegations that Venmar School was evicted from the land for non-payment of rent but insisted that the defendant had rebranded it to Hampshire which he ran.
8. Opposing the Originating Summons, the defendant filed a replying affidavit sworn on the 11<sup>th</sup> October 2023 denying the allegations made by the plaintiff and contending that the instant application was incompetent, frivolous and misconceived hence it did not meet the criteria for grant of the orders sought.
9. The defendant denied ever being in a marriage with the plaintiff but admitted that they were in a relationship in which they had two children.
10. It was the defendant's case that he was the legal proprietor of land parcel number Kisumu/Kasule/3655 which land he purchased solely and developed using his own finances and resources and at no time did the plaintiff make any contribution to the same.
11. The defendant further deposed that during the subsistence of their relationship, he caused the plaintiff and their children to reside on the suit property land parcel number Kisumu/Kasule/3655 where she remained to date.
12. It was the defendant's case that the plaintiff had not provided any documents regarding the impending sale and alleged appropriation of the said properties and thus there was no way the court could rely on her allegations.
13. The defendant reiterated that the suit property land parcel number Kisumu/Kasule/3655 was not matrimonial property as they had not been married and neither had they conducted any divorce to enable them distribute the properties and thus the instant application was premature and undeserving of the court's time.
14. The defendant similarly testified in support of his case. He adopted his witness statement and replying affidavit both dated 25<sup>th</sup> January 2024 as his evidence in chief. The defendant further produced the documents on the list dated 25<sup>th</sup> January 2024 as P Exh. 1-7. It was his case that he wanted the court to dismiss the suit with costs.



15. In cross-examination, the defendant admitted that he was in an intimate relationship with the plaintiff and were blessed with two kids. He further testified that he secured a loan from Equity Bank after fronting the plaintiff as his wife. He testified that he had on several occasions sworn statutory declarations that the plaintiff was his wife.
16. The defendant testified in cross—examination that he was the director of Pride Kings whereas the plaintiff was not. He testified that Venmar School was his tenant on the suit land from 2020 – 2021 on a lease of about 3 years though the lease was not registered and that the school only paid rent twice when it started and vacated the suit land in 2022. He admitted that the plaintiff was a director and owner of Venmar School.
17. It was the defendant’s testimony in cross-examination that the new school Hampshire started this year with a new administrator though he had no proof of the said new administrator. He testified that the school sits on the suit land and that he signed the tenancy agreement last year though he had no evidence of the same.
18. The parties filed submissions.

### **The Plaintiff’s Submissions**

19. It was submitted that by his own admission, the Defendant acknowledged that the Plaintiff was his spouse with whom he owned the matrimonial property. The Defendant cannot plead ignorance of this legal position, for it is a well-known legal maxim that ignorance of the law is no defence. The plaintiff further submitted that she had provided substantial evidence proving that she was the Defendant’s wife and that the Defendant affirmed their union vide various consents and affidavits to the charges over the several property including the suit property and that on the contrary the Defendant has not provided any evidence to disprove the marriage with the Plaintiff. The plaintiff thus submitted that this court ought to find that a marriage subsisted between the Defendant and the Plaintiff.
20. It was further submitted that having successfully established that she was in a matrimonial union with the Defendant, she has an overriding interest in the matrimonial, suit, property. The plaintiff further submitted that the parties herein established Venmar School, a family business as defined under Section 2 of the *Matrimonial Property Act* wherein she was the sole director of the said school, and managed the said school which generated income for the family.
21. The plaintiff thus submitted that she made substantial contribution during the subsistence of the marriage as to entitle her to an overriding interest on the said property and as such the court should so find. Reliance was placed on the case of *MWK v PMK (2019) eKLR*, held that “It is clear to this court that the Plaintiff is not an idle bystander in this suit. She has beneficial interest in the suit land. In as much as the same is not registered on the title, it is an overriding interest in common law and equity.”
22. It was submitted that unless she is granted an order for permanent injunction, the Defendant will evict her from the matrimonial property and that a permanent injunction restraining the Defendant from evicting her from the matrimonial property or otherwise dealing with the said property in a manner that may be injurious or prejudicial to the Plaintiff. Reliance was placed in the case of *Jiwa v Abdirihaman (2024) KEELC 1243 (KLR)*, where the court set down the ingredients for a permanent injunction as being similar to those of an interlocutory injunction, save that a permanent injunction is a perpetual order that is issued after the suit is heard finally.
23. The plaintiff also submitted that she is entitled to a permanent injunction in regards to Venmar school as she is the only person entitled in law to manage it as the defendant is a stranger to the management of the said school and that despite the orders of the court, the Defendant engaged in contemptuous acts



of rebranding the school to the Hampshire School and also nefariously firing the teachers of Venmar School thus interfering with the management of the school thus leading to a run down on the school. It was her submission that unless an order for permanent injunction is granted, the Defendant will cause irreparable damage to the school and the Plaintiff who is its director. Reliance was placed on the case of Fontana Enterprises Limited v Mwangi Chomba (2008) eKLR where the court discussed the circumstances to be considered prior to granting of permanent injunction.

### **The Defendant's Submissions**

24. It was submitted that having alleged to have been married to the defendant under customary marriage, the plaintiff had the onus of proving the same on a balance of probability and as she failed to do so there was no property deemed to be matrimonial property.
25. The defendant submitted that the plaintiff had not proved that she made any contribution to the purchase of the suit property whereas the defendant had indicated to court that he purchased the suit property using his own resources and through finance from the Equity Bank which loans he was still paying.
26. It was submitted that Venmar School allegedly owned by the plaintiff was the defendant's tenant as evidenced by the tenancy agreement which remained unchallenged and further there was no evidence adduced to show that it was the same school as Hampshire School currently on the suit premises.
27. The defendant submitted that the plaintiff was not entitled to the suit property as she has not established that the suit property is matrimonial property and that she contributed to its purchase and development or that she was the owner of the School or that the school was matrimonial property.
28. It was submitted that the application ought to be dismissed with costs to the defendants as the plaintiff has failed to establish a prima facie case or that they are likely to suffer such loss as would not be compensated by the defendant in the unlikely event that it is found that the properties were matrimonial property.

### **Analysis and Determination**

29. I have considered the pleadings herein, the oral testimonies by both parties and their respective submissions. The issue for determination is whether the plaintiff is entitled to the prayers sought.
30. The plaintiff prayed for a declaration that she has an overriding interest in the suit property wherein she operates a school and resides thereon as matrimonial property. On whether I should make that declaration, I must first define what an overriding interest is and whether the court herein has jurisdiction to make that order. Section 28 of the [Land Registration Act](#) No.3 of 2012 provides as follows:-

Overriding interest

28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –
  - a) spousal rights over matrimonial property;
  - b) trusts including customary trusts;
  - c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;



- d) natural rights of light, air, water and support;
- e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
- f) Leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;
- g) Charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
- h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
- i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
- j) any other rights provided under any written law.[emphasis added]

31. From the above provision, whereas most of what is considered to be overriding interests fall within the jurisdiction of the Environment and Land Court, determination of a) spousal rights over matrimonial property is matter that falls within the jurisdiction of this Court under the [Matrimonial Property Act](#).
32. However, I observe that the respondent vehemently denied that the two were legally married under any form of marriage. No marriage certificate was produced in evidence and neither was there proof of a customary marriage. He who alleges must prove and proof must be pegged on the pleadings.
33. There is also no prayer seeking for a declaration that the applicant and the respondent were legally married or for an order to have the two presumed as married under Luo customary law as alleged by the plaintiff in her evidence. It is therefore not possible for this court to declare that the applicant has an overriding interest in the suit property as spousal or that the said property is matrimonial property as defined under the [Matrimonial Property Act](#).
34. Moreover, the question of matrimonial property and the division thereof can only be determined after the court is satisfied that there was a marriage between the two parties. The court may nevertheless determine, on evidence presented before it, that the property is matrimonial property.
35. In this case, the applicant never sought for any prayers declaring the suit property as matrimonial property and therefore this court cannot make orders contrary to the pleadings. Parties are bound by their pleadings. A pleading and prayer for a declaration that the applicant has an overriding interest in the property is not the same as a declaration that the property is matrimonial property under the [Matrimonial property Act](#). This is so because the term overriding interest as used in the [Land Registration Act](#) is wide and goes beyond matrimonial property.
36. At this moment, I will highlight the importance of pleadings.
37. The Court of Appeal in the case of IEBC versus Stephen Mutinda Mule & Others (2014) eKLR, stated and observed thus on the significance of pleadings:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot



be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings.

Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called 'Any Other Business' in the sense that points other than those specific may be raised without notice.”

38. The Court of Appeal in the same case as cited above ventured further and stated as hereunder;

“As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score.”

39. Additionally, the significance of the Doctrine of Departure and essentially the legal position that Parties are bound by their pleadings was revisited by the Court of Appeal in the case of *Dakianga Distributors Ltd versus Kenya Seed Company Ltd* (2015)eKLR, as follows:

“A useful discussion on the importance of pleadings is to be found in *Bullen and Leake and Jacob's Precedents of Pleadings*, 12<sup>th</sup> Edition, London, Sweet & Maxwell (The Common Law Library No 5) where the learned authors declare:-'The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial. 'Sir Jack Jacob in an article entitled 'The Present Importance of Pleadings' published in (1960) *Current Legal Problems* and which article was quoted with approval by the Supreme Court of Malawi in *Malawi Railways Limited v Nyasulu* [1998] MWSC 3 states of the importance of pleadings: 'As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings. for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into



the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice. In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called 'Any Other Business' in the sense that points other than those specific may be raised without notice. 'In *Libyan Arab Uganda Bank for Foreign Trade and Development & Anor v Adam Vassiliadis* [1986] UGCA 6 the Court of Appeal of Uganda cited with approval the dictum of Lord Denning in *Jones v National Coal Board* [1957] 2 QB 55 that: 'In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.' This Court in *Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 others* (supra) cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLC* SC 91/2002 where Pius Adereji, JSC expressed himself thus on the importance and place of pleadings:

'It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.'

40. The pleadings in this case do not support the evidence and submissions on issues of marriage and matrimonial property. Even assuming that the parties hereto are married, and as I have stated, there is no pleading and prayer seeking for a declaration of the existence of a customary marriage between the parties hereto, which Customary marriage is disputed by the respondent, under sections 6 and 7 of the *Matrimonial Property Act* (No. 49 of 2013), a spouse cannot seek the division of the matrimonial property unless the marriage has been dissolved.
41. It is however not in doubt from the evidence adduced by both parties that they have lived together as husband and wife from 2010 and that they have two children together. It is also not in dispute that the applicant lives on the suit property where she runs a school whose name has since been changed by the respondent upon the two disagreeing. There is however no evidence that she was a tenant in the said property.
42. The plaintiff argued that she is the registered owner and proprietor of Venmar Schools which the defendant had rebranded to Hampshire School and that now he threatens her with eviction from the matrimonial home and further that he had taken loans using the school as security which she would likely lose if the defendant fails to settle the loans.
43. The evidence on record clearly points to a rebranding of the school as Hampshire, there being no evidence presented as alleged by the defendant showing that he had entered into a new lease with Hampshire School for lease of the suit property or that the plaintiff and Venmar School failed to remit rent as alleged. There was no evidence of rent having been paid prior to the plaintiff being halted from running the school. Rather, there is evidence adduced by both parties that they both used to be directors of Venmar School.



44. This court issued interim orders barring the defendant from interfering with the Venmar School's operations. From evidence of rebranding of the said school into Hampshire School, I find and hold that the rebranding of Venmar School to Hampshire School was illegally undertaken against this court's interim orders of 21<sup>st</sup> December 2023 and therefore such rebranding is null and void.
45. It is on that ground that I find that pending any other proceedings that the plaintiff may initiate, the prayer for an injunction merited, to protect the plaintiff's interests in the property on which she lives with her children that she shares with the defendant and carries on business in the form of a school namely, Venmar School, where the plaintiff has substantially invested and which she cannot adequately be compensated in damages if the orders of injunction sought are not granted.
46. Accordingly, I find that the plaintiff merits grant of the following injunctive orders:
- a. The defendant, M.K.O, his agents, proxies and or anyone acting on his behalf are hereby prohibited from harassing the plaintiff ZAS in any way, and or taking any action that may interfere with the plaintiff's business of Venmar School on Land Parcel Kisumu/Kasule/3655.
  - b. The defendant MKO is hereby permanently enjoined and prohibited from accessing the business of Venmar School, now renamed Hampshire school, which latter name shall forthwith revert to Venmar School; transferring teachers, dismissing them, becoming involved in its management in any capacity, operating or accessing the school account numbers held in all banks in any capacity, taking loans, withdrawing cash, and/or becoming involved in any capacity in matters pertaining to Venmar which he renamed as Hampshire School.
  - c. Decree to issue.
  - d. Each party to bear their own costs of the suit.
47. I must however register my dissatisfaction with the manner in which the pleadings were poorly drafted by the plaintiff's counsel. A party's case and evidence is founded on pleadings. I say no more.
48. This file is closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 5<sup>TH</sup> DAY OF DECEMBER, 2024**

**R.E. ABURILI**

**JUDGE**

