



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

DIVORCE & MATRIMONIAL CAUSE NO. E1 OF 2020

ENN.....PETITIONER

VERSUS

SNK.....RESPONDENT

RULING

1. The Petitioner herein filed the present petition dated 4th September 2020 seeking the following reliefs:

a) An order of judicial separation and/or divorce between the petitioner and the Respondent.

b) A declaration that the assets listed herein above though registered in the name of the respondent are matrimonial properties and the Respondent is registered as a trustee.

c) An order for division of matrimonial properties between the Petitioner and the Respondent in equal share or as the court may deem fit.

d) Any other orders that the court may deem fit.

e) Costs of the petition.

2. The Respondent's counsel Mr Kiarie filed a memorandum of appearance as well as a preliminary objection on a point of law dated 6.10.2020 seeking to have the entire petition struck out on the grounds that;

a) The petition is fatally defective and the same ought to be struck out in the first instance.

b) The entire suit offends the provisions of section 7 (3) (b) of the Magistrate's Court Act.

c) The entire petition offends the provisions of the Subordinate Courts Separation and Maintenance Act, Cap 153.

d) The entire Petition offends the provisions of section 7 and 17 of the Matrimonial Causes Act, cap 152.

3. The Preliminary Objection was disposed of by way of written submissions.

4. Mr Kiarie learned counsel for the Respondent vide submissions filed on 10.12.2020 submitted that one cannot tell whether the Petitioner seeks a separation, divorce or matrimonial cause from the prayers sought and that the petitioner is engaging in a fishing expedition. Counsel relied on section 7 and 17 of the Matrimonial Causes Act which allows for either divorce or separation and thus the petition is fatally defective. He further submitted that the parties still live together in Matuu and therefore the order for judicial separation that has been sought cannot be granted as it contravenes section 8 of Subordinate Courts (Separation and Maintenance Act) Cap 153. He submitted that an order for division of matrimonial property can only be sought after an order for dissolution of materials has been sought and granted and that the same ought to be filed in different courts. He relied on section 7 (3) (b) Magistrate's Court Act. In addition, it was submitted that the issue of matrimonial property should be filed in the High Court vide an originating summons and not vide a petition. The Respondent sought reliance in the case of **Mukisa Biscuit Manufacturers Limited vs West end Distributors Limited (1969) E.A 696**.

5. M/S Njiraini & co. Advocates for the Petitioner filed submissions dated 28th day of January 2021 where it was submitted that the petition has been filed based on the provisions of the Matrimonial Causes Act, Cap 152 and the Matrimonial Property Act, No 49 of 2013. It was also

submitted that the petition does not offend section 7 and 17 of the Matrimonial Causes Act, that the issues raised are factual and do not raise a point of law. It was contended that the petitioner has not offended the Magistrate's Court Act and that the issues raised by the respondent are misconceived. Reliance was placed in the case of **Mukisa Biscuit Manufacturers Limited vs West end Distributors Limited (1969) E.A 696 and Republic vs Eldoret Water and Sanitation Company Limited ex parte Booker Onyango & 2 others (2007) eKLR.**

6. I have considered the petition, the notice of preliminary objection and the submissions of counsel and I find that the following issues arise for determination;

- a) *Whether the grounds in the notice of preliminary objection are points of law.*
- b) *Whether the entire suit offends the provisions of section 7 (3) (b) of the Magistrate's Court Act.*
- c) *Whether the petition offends the provisions of the Subordinate Courts Separation and Maintenance Act, Cap 153.*
- d) *Whether the Petition offends section 7 and 17 of the Matrimonial Causes Act, cap 152.*
- e) *Whether the petition is fatally defective.*

7. As regards the first issue, a preliminary objection on a point of law was established in the case of **Mukisa Biscuit Manufacturers limited vs West end Distributors Limited (1969) E.A 696** that;

“a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

8. The Supreme Court of Kenya discussed the issue of Preliminary Objections the case of **Independent Electoral & Boundaries Commission –v- Jane Chepkiner & 2 Others [2015] eKLR** where it was stated that:-

“[21] The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

9. The same court in the case of **Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR** stated that:

“...a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”.

10. *Being guided by the above authorities, this court must exercise caution before dismissing the petitioner's suit summarily since striking out of suits is a draconian action unless it is plainly clear that the suit is hopelessly defective and not worthy of a contest.*

11. *In another Supreme Court case of Kalpana Rawal & 2 Others vs Judicial Service Commission & 6 Others [2016] eKLR the Court stated that the examples of jurisdiction and limitation given by law J.A in the Mukisa Biscuits case were but only examples of two grounds worthy of preliminary hearing and that a checklist approach to the test as to whether a matter merited and fell under the Mukisa Biscuits case was not in consonant with the spirit and letter of the Constitution. The court then proceeded to state that where the Preliminary Objection raised a “fundamental issue” (per Mutunga CJ) then as a matter of good order it was appropriate to have the issue settled first even if there were apparent factual conflicts.*

12. As to whether the preliminary objection raises points of law, this Court will have to interrogate each point raised before making a conclusion however on the face of it, the Respondent has cited various statutes that he alleges have been contravened.

13. As regards whether the suit offends **Section 7 (3) (b) of the Magistrate's Court Act** which states that;

A magistrate's court shall have jurisdiction in proceedings of a civil nature concerning any of the following matters under African customary law —

- (a)
- (b) *marriage, divorce, maintenance or dowry;*

The Respondent has urged this court to strike out the petition on this limb.

14. In the case of **Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009** the court in looking at the issue of striking out of pleadings stated that

“the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out. But the new approach is not to say that the new thinking totally uproots all well-established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice.”

15. The Constitution of Kenya 2010 provides for the jurisdiction of this court in Article 165 (3) that Subject to clause (5), the High Court shall have;

(a) Unlimited original jurisdiction in criminal and civil matters.

That is to say that this court has jurisdiction to hear all civil matters including divorce petitions. However, with the giving of jurisdiction to the subordinate court, this Court has only been left with jurisdiction to handle matrimonial property issues and act as an appellate court in cases like the one before this court.

16. On that limb, I find that the matter should have been filed at the lower court and the issue of matrimonial property be filed in the High Court. This is also supported by section 7 and 17 of the Matrimonial Property Act that has been cited by the Petitioner in support of her case. The said sections provide for division of matrimonial property upon divorce and/or dissolution of the marriage. It reads as follows:

“Subject to section 6(3), 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.”

17. **Section 17** of the Matrimonial Property Act provides 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”
emphasis added.**

18. **Section 17** of the **Matrimonial Property Act 2013** grants a party the right to file an application before division of matrimonial property proceedings commence. This therefore allows the Petitioner to file the matter before this court regardless of whether or not other actions have been commenced in another court.

19. As regards the contravention of the Subordinate Courts Separation and Maintenance Act, Cap 153 and the Matrimonial Causes Act, Cap 152 which were repealed in 2014, I can only be guided by the decisions of the court in what they have said about advocates who are not diligent with regards to the law. It is quite unfortunate that both counsels submitted on a law that was repealed over 6years ago. The statutes mentioned by both advocates are no longer law as they were repealed in 2014.

20. **The Supreme Court in the case of Daniel Kimani Njihia v Francis Mwangi Kimani & Another [2015] eKLR and Michael Mungai v Housing Finance Co. (K) Ltd & 5 other [2017] eKLR** held that the extraordinary standing of that Court demand that litigants must be clear on the jurisdiction they are invoking, especially by invoking the correct provision of the Constitution or statute. The court went on to hold that an omission in that regard is not a mere procedural technicality, to be cured under Article 159 of the Constitution. The Court further found it sad for a party to rely on a repealed statutory provision to bring an application before it.

21. **In the case of Michael Mungai v Housing Finance Co. (K) Ltd & 5 other [2017] eKLR** the Supreme Court held that:

“In the case of Hermanus Phillipus Steyn v. Giovanni Gnechi-Ruscione, Supreme Court, Application No. 4 of 2012, this Court was categorical that a Court has to be moved under a specific provision of the law. The Court stated that: it is trite law that a Court of law has to be moved under the correct provisions of the law. We reiterate that the only legal regime for the Supreme Court is the Constitution, the Supreme Court Act and the Supreme Court Rules, 2012 (as amended). Hence it is preposterous for the applicant to purport to bring his application under other statutory provisions that are not the Supreme Court Act. It is sadder that he has the audacity to even invoke provisions of repealed pieces of legislations. No court can be moved on the basis of a repealed law. What right if at all does a repealed law give? The answer is clear: none.”

22. On whether the petition is fatally defective and ought to be struck out, this Court finds that it is trite law that a matter regarding division of matrimonial property ought/shall have the following facets proved by either party:

- a) *The fact of a valid, legal, regular marriage in law;*
- b) *Dissolution of such marriage by/through an order of the Court;*
- c) *That earmarked/listed property constitutes matrimonial property; acquired and developed during subsistence of the marriage;*
- d) *Contribution by each party to the acquisition/*

development.

23. These are factual issues that cannot be litigated at this point. This court has the requisite jurisdiction to hear and determine matters regarding division of matrimonial property and hence has power to hear and determine the instant matter and more specifically on the division of matrimonial property which shall commence upon proof of dissolution of marriage. The respondent's counsel has submitted that the petitioner and respondent are still married and living together in Matuu town. These are matters of fact requiring a trial to determine the same. Hence, the preliminary objection raised might have the effect of denying parties the opportunity to ventilate their rival claims. It is clear that the preliminary objection does not raise pure points of law and not in consonance with the principle established in the Mukisa Biscuit case (Supra). I am therefore inclined to reject the preliminary objection raised by the respondent.

24. In the result, it is my finding that the preliminary objection dated 6. 10. 2020 lacks merit. The same is dismissed with no order as to costs.

It is so ordered.

Dated and delivered at **Machakos** this **10th** day of **March, 2021**.

D. K. Kemei

Judge