



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. E016 OF 2021**

**JWW.....APPLICANT**

**VERSUS**

**CWN.....RESPONDENT**

**RULING**

1. The Applicant JWW filed a Notice of motion together with an Originating Summons Application both dated 6<sup>th</sup> April, 2021 pursuant to Order 40 Rule 1, Order 51 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the Law. This ruling is in respect to her application, which sought to have the status quo maintained in respect of the ownership, or title to several properties which she claimed were matrimonial, pending the hearing and determination of the matrimonial cause between the parties herein. The properties listed are as follows:

- i. Plot No. [...]Kasarani – Nairobi L.R [...] – matrimonial home
- ii. Plot No. Aguthi/1 thekahuni/[...]
- iii. Ruiru East Block 5/[...]
- iv. Land Reference No. [...]
- v. Plot No. 201 Juja [...]
- vi. Plot No. 202 Juja [...]
- vii. Toyota Saloon Car registration No. KCJ [...]
- viii. Toyota Station Wagon Registration No. KCH [...]
- ix. Pick up registration No. [...]

2. The application was supported by the affidavit sworn by the Applicant on 6<sup>th</sup> April, 2021. It was her case that she was married to the Respondent in the year 2000 and their union was blessed with two issues. She averred that during the subsistence of the marriage she contributed to the acquisition of the suit properties. She stated that her marriage to the Respondent had irretrievably broken down and she is apprehensive that the Respondent may, or was in the process of alienating the matrimonial properties without her consent. She contended that the alienation of the properties by the Respondent without her consent was meant to extinguish her matrimonial interest. She asserted that unless restrained, the Respondent would alienate the matrimonial properties leading to irreparable loss and damage.

3. On 29<sup>th</sup> April, 2021 when the application came to Court for hearing, the Court noted that despite service of the application upon the Respondent he had neither filed a response nor did he appear in Court to state his case. Counsel for the Applicant, Ms Kinyati urged the Court to grant the Orders sought in their application.

4. I have considered the application and the affidavit in support thereof. The issue that renders itself for determination is whether the applicant can be availed the orders sought, when their marriage still exists.

5. Under **Section 3** of the **Marriage Act**, marriage is defined as the voluntary union of a man and a woman whether in a monogamous or

polygamous union and registered in accordance with the Act. From the pleadings, the Applicant claimed to have contracted an African Christian marriage with the Respondent in the year 2000. She further stated that the marriage had irretrievably broken down. However, there was no indication that the parties have divorced or separated at the time the application was filed.

6. The Applicant that the Respondent intended to dispose of the matrimonial property which they had jointly acquired during the subsistence of their marriage. She attached certificates of title to the following properties: Ruiru East Block [...], KCJ [...], KCH [...], all registered in the name of the Respondent and L.R No. [...] registered in the joint names of the parties herein. The Applicant claimed that Plot No. [...] Kasarani situated on L.R [...] was their matrimonial home. She urged the Court to protect her interests in the properties listed in her application which she claimed were acquired during the subsistence of the marriage and were therefore matrimonial property.

7. Matrimonial property is defined under **Section 6** of the **Matrimonial Property Act** as:

- a) the matrimonial home or homes;
- b) household goods and effects in the matrimonial home or homes; or
- c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

8. The Matrimonial Property Act also provides for declaratory orders under its **Section 17** which 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 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.”

9. In the persuasive case of **N.C.K vs G.V.K [2015] eKLR**, Muchelule J stated thus:

“In England, under the Matrimonial Causes Act 1973, in instances where parties, for religious or other reasons, do not want to divorce, and if a couple chooses not to bring matrimonial proceedings, the court will resolve any questions about the beneficial entitlement to their property without using the divorce court’s adjustive power. The Family Law Act 1966 at section 33(4) provides for declaratory orders which are intended to do no more than declare the nature of the interest that is claimed. In the case of **Arif vs Anwar [2015] EWHC 124 (FAM)** the parties filed divorce proceedings but the same was yet to be determined. The court proceeded to declare each party’s beneficial interest in the matrimonial property without severing the same. Further in **L (Children), RE [2012]EWCA CIV 721** where a married couple were having considerable differences to the point of not being able to cohabit together, the judge issued an occupation order pursuant to section 33 of the Family Law Act 1996 requiring the husband to vacate the matrimonial home forthwith and to remain from it until a certain period, and gave a shared residence order.”

10. The effect of **Section 17** of the Matrimonial Property Act 2013 is that where divorce proceedings are pending, or the coverture is not sustainable but the spouse is not seeking a divorce, they may come to Court to resolve any questions about the beneficial entitlement to their property. A spouse can seek declaratory orders which are intended only to declare the nature of the interest that is claimed. The Court may declare each party’s beneficial interest in the matrimonial property without severing and distributing it.

11. In my view, such a proclamation is not in conflict with **Article 45(3)** of the Constitution. Accordingly, **Sections 7** which deals with distribution of matrimonial property upon divorce and **Section 17** which protects the rights of spouses in relation to matrimonial property during the existence of the marriage are consistent with, and seek to reinforce, **Article 45(3)**.

12. In view of the foregoing, the Applicant is seeking a declaration of rights by maintaining the status quo of the suit properties pending the hearing and determination of the matrimonial cause. Despite the dearth of evidence given in this application, I am of the view that the grant of interim reliefs is necessary to preserve the property pending the hearing and determination of the matrimonial cause. Further, there is need to avoid the party becoming a holder of a barren result depending on the outcome thereof. For that reason, this Court only considered properties jointly owned by the parties and their matrimonial home.

13. Accordingly, I allow the application dated 6<sup>th</sup> April, 2021 and order that:

- i. The status quo be maintained in respect of the title to L.R No. [...] and Plot No. [...] Kasarani situated on L.R No. [...] pending the hearing and determination of the matrimonial cause between the parties herein.
- ii. Costs to be in the Cause.

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 3<sup>RD</sup> DAY OF JUNE, 2021.**

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of.....Advocate for the Applicant**

**In the presence of.....Advocate for the Respondent**