



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MATRIMONIAL CAUSE NO.11 OF 2017

IN THE MATTER OF SECTION 6 AND 17 OF

THE MATRIMONIAL PROPERTY ACT 2013

CNK.....OBJECTOR/APPLICANT

-VERSUS-

SKN.....DEFENDANT/RESPONDENT

RULING

1. This is a ruling on application dated 4th March 2019. It seeks to review orders issued on 20th February 2019 and to set aside the said orders.
2. Grounds of the face of the application are that there is an error on the face of record. That there is discovery and important matter; that the error has occasioned great injustice on the part of the applicant.
3. That there is a lacuna in the interpretation of **Section 6 of the Civil Procedure Act**. That in the interest of justice this court be pleased to allow the prayers sought; that the application has been timeously brought and in good faith.
4. The application is supported by affidavit sworn by the plaintiff/Applicant on 4th March 2019. She averred that she instituted this suit on 17th August 2017 vide originating summons and contemporaneously filed application under certificate of urgency on even date; that the respondent was served with the said pleadings but never entered appearance but response to the application vide replying affidavit filed on 5th April 2018 and served her Advocate on 11th April 2018.
5. She averred that when the matter came up on 31st July 2018, the respondent never showed up despite having been served. That on 31st July 2018, the applicant's counsel sought from the court legitimacy of respondent's Advocates being on record and the court observed that the firm of **[particulars withheld]** were improperly on record and directed that the respondent be served directly with application dated 14th August 2017 amongst other orders.
6. That the said firm regularized and filed their papers on 26th September 2018; that the court gave directions on filing of submissions but the respondent did not file.
7. That the court struck out the application together with the entire suit with costs to the respondent on ground that there is a divorce suit pending; Divorce Cause No.6 of 2014.
8. That contrary to annexures filed with the replying affidavit, there was an amendment done in the said cause on 17th May 2017, which deleted matrimonial issues from the said cause. She attached the amended plaint; and the said amended was responded by the respondent.
9. That the issues before this court and the chief magistrates' court are not similar; that it was unfair on the part of the applicant to strike out the suit without being given a hearing.
10. That it was an oversight on her Advocates part to fail to seek leave to file response to replying affidavit and that it is a genuine mistake, which should not be visited on client. That the divorce court was last in court on 1st February 2019 for pretrial directions.
11. In response, the respondent filed replying affidavit sworn by the respondent on 27th March 2019. He averred that this application is an abuse of court process; he denied the applicant's averment that the issue of matrimonial property is not part of the divorce cause before the

chief magistrates' court. That it is clear from the pleadings attached by the applicant that the vehicles [particulars withheld] and land parcel number [particulars withheld] are part of reliefs sought in the divorce cause.

12. That the answer to petition and cross petition seeking relief is dated 29th May 2017 and was filed on 9th July 2017 before filing of matrimonial cause(OS) on 17th August 2019.

13. He averred that it is an abuse of the court process for the applicant to ask this court to determine issues that are already before the lower court for determination in a previously filed proceedings being Nakuru Divorce Cause No.6 of 2014.

ANALYSIS AND DETERMINATION

14. The respondent's argument is that issues raised by the originating summons filed by the applicant herein are part of reliefs sought in Divorce Cause No.6 of 2014 before the lower and by seeking to reinstate the OS is an abuse of court process. On the other hand, the applicant's argument is that the pleadings were amended to exclude matrimonial properties and that the applicant's counsel failed to file response to respondent's replying affidavit to demonstrate that.

15. On perusal of documents annexed by parties, I note that in the further amended petition, paragraph 10 (f) & (g) explain how the properties herein were acquired and dealt with. No prayers are however sought in respect to the said land. The paragraph, which had particulars on land parcel, was deleted.

16. Prayers in the divorce cause are as hereunder:-

- a) The marriage between petitioner and respondent be dissolved
- b) The respondent be restrained from emotionally and physically assaulting the petitioner and coming near petitioner
- c) Respondent be condemned to pay costs of the suit.

17. In the response to further amended plaint. The respondent filed cross petition seeking orders in respect of the properties. Prayers sought are as follows:-

- a. Petition be dismissed.
- b. Cross petition be allowed.
- c. Declaration that the petitioner is the owner of land parcel [particulars withheld].
- d. Cancellation of the title, which is in joint names.

18. In the supplementary affidavit, the applicant averred that she did not make prayers on matrimonial property in the further amended petition and she denied jurisdiction of the lower court to deal with the issue.

19. **Section 6 of the Civil Procedure Act** provide as follows:-

“No court shall proceed with the trial of any suit or proceeding in which the matter is also directly or substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

20. On perusal of the further amended petition, I note that the Petitioner deleted her claim on matrimonial properties. However, the respondent in answer to amended petition filed cross petition seeking declaration in respect to one of the properties namely Land [particulars withheld]. The claim in the cross petition is for one matrimonial properties land whereas properties listed in in this suit are three including the land that respondent is also claiming in the divorce petition.

21. The lower court matter was filed before this Matrimonial Cause. Claim on one of the properties Land [particulars withheld] is one of the properties also listed in this suit.

22. It is true that the petitioner in divorce matter deleted all claims on matrimonial property but the claim by the respondent on the land still stand and is awaiting determination by trial court. The applicant has said she is challenging jurisdiction in respect to prayer on matrimonial property in the lower court but as at now, no pronouncement has been made by the lower court in respect of jurisdiction.

23. My view is that it will not be proper to have part of the property litigated in the lower court and others in the High Court. Parties herein should clean up their pleadings in the lower court if they wish to file separate claim for matrimonial property in the High Court.

24. From the foregoing, as at now I see no merit in the application. Orders issued on 20th February 2019 to remain.

25. FINAL ORDERS

1. The application dated 4th March is dismissed.
2. Each party to bear own costs.
3. Orders issued on 20th February 2019 dismissing this suit cause are set aside.
4. This matrimonial cause is reinstated.

Ruling dated, signed and delivered at Nakuru this 6th day of February, 2020.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

Jeniffer – Court Assistant

Ms. Mukira for Plaintiff/Applicant

Ms. Ngugi holding brief for Murimi for Respondent