



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MATRIMONIAL CAUSE NO 14 OF 2019

M W K.....APPLICANT

VERSUS

K I aka J K I1ST RESPONDENT

JKK.....2ND RESPONDENT

PMK.....3RD RESPONDENT

JGK.....4TH RESPONDENT

RULING

1. The uncontested facts of this case are that **MWK** (the Applicant) married **KI** aka **JKI** (1st Respondent) under Kikuyu Customary law in 1953 and together they have several children. The 1st Respondent subsequently married a second wife, **M. W**, now deceased. She was the mother of **JKK**, **PMK** and **JGK** (2nd to 4th Respondents, respectively). The Applicant and 1st Respondent have during the subsistence of their marriage acquired various immovable and moveable properties including the following properties, hereinafter referred to as the suit properties:-

- a) Githunguri/Githiga/****
- b) Githunguri/Githiga/*****
- c) Githunguri/Githiga Town/****
- d) Githunguri/Githiga /****
- e) Githunguri/Githiga /****
- f) Githunguri/Githiga /****
- g) Githunguri/Githiga /****
- h) Githunguri Town Property (****)
- i) Githunguri/Githiga/Market No.***
- j) Githunguri/Githiga/Market No.***
- k) Githunguri/Githiga/Market No.***
- l) Githunguri/Githiga/Market No.***
- m) Githunguri/Githiga/Market No.***
- n) Longonot/Kijabe Block ***/(Eleri)

o) Longonot/Kijabe Block *** (Eleri)

p) Shares in Gatatha Farmers Co. Ltd.

2. The Applicant's matrimonial home is erected on the asset (a) above and she currently resides there. The said asset was registered in the name of the 1st Respondent as sole proprietor until the 2nd August 2019 when he transferred it to the joint ownership of the 2nd and 3rd Respondents and himself. He had also transferred asset (c) above to the 4th Respondent. These among other actions alleged by the Applicant prompted the filing of the instant Originating Summons (OS) against the Respondents. The Applicant alleges that she contributed to the acquisition of the suit properties; and that the transfers in favour of the 2nd to 4th Respondents were carried out in a clandestine manner and without her consent. In the OS, she seeks several prayers including a declaration that the suit properties are/were held by the 1st Respondent on his own behalf and in trust for the Applicant, a declaration that any transfer, alienation and or disposition of the said assets from the 1st Respondent to the 2nd to 4th Respondents without her consent is illegal null and void.

3. Along with the OS the Applicant filed a motion, expressed to be brought under Orders 40 Rules 1, 2 and 3 of the Civil Procedure Rules, Sections 2, 6, 7, 9 and 17 of the Matrimonial Property Act, *inter alia*. Therein, she prays that pending the determination of the suit the Respondents and or their servants or agents be restrained from:

i) Evicting and/or excluding the Applicant and/or in any way interfering with the Applicant's peaceful occupation of the matrimonial home situate at **Githunguri/Githiga*****;

ii) Alienating and/or otherwise selling, interfering with or wasting the suit properties.

She also seeks an order that pending the determination of the suit, the *status quo* be maintained in respect of ownership or title to the suit properties, so that there be no transfers in respect of the suit properties.

The motion is supported by the affidavit sworn by the Applicant.

4. The 1st Respondent swore a lengthy affidavit in opposition to the motion and originating summons, on his own behalf and on behalf of his co-Respondents, in addition to filing grounds of opposition and a notice of a preliminary objection. The court directed that the preliminary objection be disposed of first by way of skeletal submissions followed by oral highlighting. Although the objection raised three grounds only two were argued by the Respondents' counsel, Dr. Kamau Kuria. The grounds are expressed as follows:

a) That this court lacks jurisdiction under the repealed Married Women's Property Act of 1882 or the Matrimonial Property Act of 2013 to entertain the suit and motion as the dispute therein is a purported property dispute between a wife and a husband over properties acquired during marriage and that the Applicant has enjoined persons other than her husband.

b) That the court lacks jurisdiction to entertain the Applicant's property dispute with the 2nd to 4th Respondents to whom the 1st Respondent has transferred properties and as such disputes fall within the jurisdiction of the Environment and Land Court (ELC) pursuant to the provisions of Article 162 of the Constitution. Therefore, the entire suit should be struck out.

5. On the first limb, it was argued that Section 17(2) of the Matrimonial Property Act provides for the filing of a declaratory suit by a spouse against another but excluding 3rd parties such as adult children; that the entire Act only envisages disputes between spouses and that where a spouse has to sue another spouse and third party, the proper procedure is to file an ordinary suit under Order 3 of the Civil Procedure Rules (CPR), the originating summons procedure being reserved for straight- forward claims as stated in **Tejpal Haria and Another v Pravinchandra Meghji Dodhia and 2 Others [2007] e KLR**.

Relying on decisions of the Court of Appeal interpreting Section 17 of the Married Women's Properties Act of 1882, including **Muthembwa v Muthembwa (2002) IE A 187 and Echaria v Echaria Civil Appeal No. 75 of 2001**, counsel contended that the court has no jurisdiction to entertain a property dispute involving spouses and third parties brought under Section 17 of the Matrimonial Property Act, and that in such a case, such suit must be commenced by way of a plaint as anticipated in Order 3 Rule 1 of the CPR, as was also stated by the Court of Appeal in **Mugo Muiri Ltd v Elizabeth Bageine and Others Civil Appeal No.62 of 2003** and in **Housing Finance Company of Kenya Ltd v Faith W. Kimeriah and Another [1998] e KLR**.

6. Reiterating the cause of action pleaded against the respective Respondents, the submission was made that the Respondents' title to the properties in question can only be challenged in a proper court through a proper action. Reliance was placed on the decision of the Court of Appeal in **Elizabeth Wambui Githinji and Others v Kenya Urban Roads Authority [2019] e KLR**. The court was therefore urged to strike out both the motion and the Originating Summons.

7. For her part, the Applicant opposed the Preliminary Objection. Her Counsel, Mr. Ngeru argued firstly, that the Married Women's Property Act of 1882 having been repealed has no application and that the authorities relied on by the Respondents interpreting its provisions are irrelevant. Invoking the provisions of Article 159 (2) (d) of the Constitution, he urged the court to consider substance above procedural technicalities. He submitted that an Originating Summons is not a summary process but is a suit like any other. Counsel stated that the Notice of Preliminary Objection in this case does not raise a pure point of law, and that the question of joinder as raised in the Notice of Preliminary Objection is not suited as a ground in a preliminary objection.

8. Restating the gist of the Applicant's case, counsel asserted that nothing in the Matrimonial Property Act bars an applicant, where necessary to enjoin her spouse and parties other than her spouse in an action. In reference to Section 12 of the said Act, counsel pointed out that its wording envisages persons other than spouses being enjoined in a suit brought under the Act. And that in any event, where the court

finds that the 2nd to 4th Respondents were wrongfully enjoined the cure would be to strike out their names, rather than strike out the entire suit. Asserting that the Applicant's interest to the suit properties is matrimonial in nature, counsel argued that the Applicant is entitled to benefit from laws governing matrimonial property and that this court has the necessary jurisdiction over the property and is not barred from giving orders concerning title to land.

9. In a brief rejoinder Dr. Kuria asserted that the issue at hand was not joinder or misjoinder as asserted by counsel for the Applicant, but rather about the fact that the procedure provided for under the Matrimonial Property Act applies between spouses only. He stated that the procedure in the law serves a purpose and ought to be invoked.

10. The court has considered the pleadings on record, the grounds in the Notice of Preliminary Objection and arguments made by the respective parties. The jurisdiction of this court to entertain disputes concerning matrimonial property is found in the Matrimonial Property Act. The jurisdiction covers all matrimonial property whether moveable or immoveable. Matrimonial property is defined at section 6 of the Matrimonial Property Act as follows:

“(1) For the purposes of this Act, matrimonial property means—

(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.

(2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.”

11. While there is no dispute that this Court is properly seized of the dispute between the Applicant and the 1st Respondent, the key question raised by the two grounds argued by the Respondents in my view speaks more to procedure than jurisdiction. That is, whether in the circumstances of this case, and the applicable law, the Applicant has properly approached this court, so far as the 2nd to 4th Respondents are concerned. The closing submissions by the Respondents' counsel clearly demonstrate this. In my own view and without determining the point with finality, I think there is some merit in the submission that, the Matrimonial Property Act is *primarily* envisaged to apply to property disputes between spouses, rather than spouses and non – spouses.

12. As regards the applicable procedure under Section 17 of Matrimonial Property Act, the law anticipates an application. Section 18 of the Act provides that the Rules committee established under the Civil Procedure Act shall make rules to regulate any matter of practice or procedure under the Act, including the procedure to be followed and the time for filing and service of documents. As yet, no rules have been made under the Act, and the fact most of the Section 17 applications made to the court since the enactment of the Act have been brought pursuant to Order 37 of the Civil Procedure Rules is probably a carry-over from the procedure obtaining under Section 17 of the repealed Married Women's Property Act of 1882.

13. Section 17 of the repealed **Married Women's Property Act, 1882** clearly provided for a summary procedure as the text indicates:-

“17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or share of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of county court of the district, or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matter in question to be made in such manner as he shall think fit.”

14. The repealed Act was a statute of general application and cannot be deemed to apply as subsidiary legislation in the absence of rules under the Matrimonial Property Act as proposed by the Respondents. The Act was repealed in total and cannot, pending the formulation of rules be applied. There is no doubt that Order 37 also provides for summary procedures in respect of certain matters. In this case, the Applicant has invoked Order 37 Rule 11 of the Civil Procedure Rules which provides that:

“Any person claiming to be interested under a deed, will, or other written instrument may apply in chambers by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the person.”

15. Whether or not the Applicant's case falls under this provision is a matter of evidence. What is not in dispute is that in absence of rules, the specific procedure for making an application under Section 17 of the Matrimonial Property Act appears uncertain. In this case the matter is further complicated by the fact that the Applicant's case is brought not only against her spouse but also against other parties. As observed in **Bhari v Khan (1965) E.A. 94** the jurisdiction and scope of enquiry of a court in an originating summons is limited. Per

Newbold, Ag. V P: -

“An originating summons is a form of legal proceeding designed to give, in certain specified circumstances, a quick,

summary and inexpensive remedy”

16. The procedure is not generally appropriate for complex or obscure matters which require extensive inquiry. In the above case, **Spry JA** observed however that:

“The word “suit” may, and I think does, in certain contexts of the ordinance include proceedings begun by originating summons, but it is, to my mind, quite clear that the whole object of 0.36 is to provide a simple procedure by which certain minor matters can be disposed of without the formality or expense of an ordinary suit.”

17. Thus, under Order 37 Rule 19(1) Civil Procedure Rule it is provided that:

“Where, on an originating summons that this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, Order that any affidavits filed shall stand as pleadings with or without liberty to any of the parties to add to, or to apply to particulars of, those affidavits.”

18. In light of all the foregoing the court finds that in view of the undisputed relationship between the parties herein and the dispute pleaded, the procedure adopted by the Applicant is not appropriate for settling the questions to be determined in this matter. I also noticed that the Respondents’ submissions did not specifically address the question raised in their second ground of objection, namely, whether the proper court to entertain the property dispute between the Applicant and the 2nd to 4th Respondents is the ELC or the High Court. That issue calls for some consideration in view of the orders this court proposes to make.

19. As already observed, the dispute between the spouses herein appears inextricably intertwined with the dispute between the Applicant and the 2nd to 4th Respondents and in my opinion, it would fly in the face of the overriding objective, in addition to possibly perpetuating an injustice, to enforce a bifurcation of the two.

20. In **Co-operative Bank of Kenya Limited v Patrick Kang’ethe Njuguna and 5 Others [2017] e KLR** the Court of Appeal while considering the jurisdiction of the Environment and Land Court (ELC) in dealing with suits arising from land dispositions such as charges and mortgages vis-à-vis disputes connected to “use” of land, applied *the dominant issue test*, observing that:-

“In Paramount Bank Limited v Vaqvi Syed Qamara & Another [2017] e KLR, this Court while discussing the jurisdiction of the Employment and Labour Relations Court over a claim of malicious prosecution expressed itself thus:

“The origin of the dispute between the 1st Respondent and the appellant was presented as a dispute arising from an employee/employer relationship, where the appellant accused the 1st Respondent of theft followed by a criminal charge of stealing by servant. This was further followed by suspension and finally summary dismissal. There cannot therefore be any doubt that, in addition to the claim for (damages for) unfair termination, the claim relating to general damages for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its power under Section 12 of the Employment and Labour Relations Court, the Court could entertain the dispute in all its aspects and award damages appropriately.”

21. The Court of Appeal then concluded that: -

“By parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender”.

22. Similarly, the dominant issue in the case before me is the determination of the Applicant’s entitlement under the Matrimonial Property Act, to the suit properties as against the 1st Respondent primarily, and by extension as against the other Respondents. Under Section 17 of the Matrimonial Property Act, this court is clothed with the necessary jurisdiction to adjudicate over all the aspects of the dispute. It is therefore my view that, contrary to the submissions of the Respondents, this is not a clear-cut case for the striking out of the Originating Summons or application. Striking out a suit is a draconian step.

23. In **Kivanga Estates v National Bank of Kenya Limited (2017) eKLR**, the Court of Appeal stated that:

“It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction capable of bringing a suit to an end before it has even been heard on merit. Yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations ... Striking out a pleading though draconian, the Court will in its discretion resort to it, where, for instance the court is satisfied that the pleading has been brought in abuse of its process or where, it is found to be scandalous, frivolous and vexatious”.

24. This is not true of the present case: a mistaken procedure, without more, does not amount to abuse of the process of the court. In **Geminia Insurance Company Ltd. V Kennedy Otieno Onyango (2005) e KLR, Musinga J** (as he then was) stated that:

“It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases, and particularly, where it is evident that the suit is beyond redemption”.

25. While this Court does not accept the proposition that the provisions of Article 159 (2) (d) of the Constitution , or the overriding objective should be used as a shield by parties who blatantly disregard procedure, the court is of the view that in the circumstances of this case, there can be no justification for striking out the originating summons.

26. In my considered opinion, a way of redemption is available to salvage the present cause, pursuant to the provisions of Order 37 Rule 19 of the Civil Procedure Rules, as read with Orders 1 and 3 of the Civil Procedure Rules. In view of the nature of the dispute and parties thereto, and the court’s finding that the summary procedure prescribed under Order 37 is not appropriate for this case, the Court nevertheless declines to strike out the originating Summons. Instead, invoking the provisions of Order 37 rule 19 of the Civil Procedure Rules, the court will order that:

- a) These proceedings will continue as if the cause had been begun by filing a plaint;
- b) Any affidavits filed shall stand as pleadings, with liberty to the parties, first to the Applicant within 15 days, and then to the Respondents within a similar period, to add to the affidavits already filed;
- c) Pursuant to the provisions of Order 37 rule 19 (3), Order 11 of the Civil Procedure Rules shall apply to these proceedings;
- d) The preliminary objection is disallowed, and the court will proceed to hear the motion by the Applicant. In view of the fact that normal court sessions have not resumed, the Court directs that the motion be disposed of by way of written submissions as follows:
 - (i) Upon the effluxion of the period of 30 days in (b) above, the Applicant will have 30 days to file and serve her written submissions which should be no more than 10 typed pages (font size 12) upon the Respondents.
 - (ii) Upon being served, the Respondents will have equal time to file and serve in similar format, their own submissions.
- e) The Ruling will be delivered electronically via email, unless otherwise advised, on 12th November 2020;
- f) In the meantime, the interim orders granted herein will remain in force; and
- g) Parties will bear their own costs in respect of the preliminary objection in view of the nature of the dispute.

SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 12TH DAY OF MAY 2020.

C. MEOLI

JUDGE