



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
CIVIL SUIT NO. 7 OF 2018 (OS)
IN THE MATRIMONIAL PROPERTY ACT NO. 49 OF 2013

AND

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

BETWEEN

MMM.....PLAINTIFF

VERSUS

WNK.....DEFENDANT

RULING.

By a **Notice of Preliminary Objection** filed on the 21st February, 2018 by the Defendant's Advocate brought under **The Matrimonial Property Act No. 49 of 2013**; the Applicant brought his application under the following grounds:

- a) That the suit and application offends the provisions of Section 7 of the Matrimonial Property Act, 2013;
- b) That the orders sought are incapable of being granted in law;
- c) That the Courts jurisdiction to entertain the suit and application has not arisen; and
- d) That the suit is defective, bad in law and does not lie.

By Notice of motion dated 31st January, 2018 filed under certificate of urgency and expressed to be brought pursuant to the Matrimonial Property Act 2013 and Order 40 Rule 1, 2 & 4 of the Civil Procedure Rules CAP 21 of the laws of Kenya, the Applicant has sought the following orders:

- a) Pending the hearing and determination of this application, the Defendant be restrained by way of temporary injunction whether by himself, his agents, servants, and/ or employees of [particulars withheld] Management Limited, persons claiming under him or otherwise howsoever from alienating, disposing, selling, encumbering, assigning, transferring or in any other like manner dealing with [particulars withheld] management in Kileleshwa Madera Road, 2 bed roomed (11 houses), 1 bedroom apartments (5 houses), an office, ½ acre piece of land at Ruiru estate Block [particulars withheld], a 3 bedroom apartment in Lavington Mbaazi Road, Pambo lane and a Subaru forester.
- b) Orders compelling the defendant to submit all sale proceeds, rent proceeds and bank statements of the defendant and any documents pertaining to the above properties ([particulars withheld] Management Limited where the applicant is a shareholder) for accounting, clarification and transparency.

The parties have been married since the year 1993 and have been blessed with two issues as a result thereof.

That the **Divorce Cause No. 56 of 2017** filed by the Defendant/ Respondent has not yet been concluded and is still pending in the Trial court for determination.

As was stated in the case of MUKISA BISCUITS MANUFACTURING CO. LTD vs. WEST END DISTRIBUTORS LTD [1969] E.A. 696, per Law J.A.:-

“...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.”

In the instant case, the dominant issue is the jurisdiction of the Court to entertain the matter whilst the issue of matrimonial property kicks only after dissolution of marriage between the parties.

The issue of jurisdiction is premised on the following case;

OWNERS OF THE MOTOR VESSEL “LILLIAN S” vs. CALTEX OIL (KENYA) LTD [1989] KLR 1 which provides that:

“...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The first issue is that the Court has no jurisdiction to hear and determine the matter as the Applicant and Respondent are married. **Section 7 of the Matrimonial Property Act 2013**, provides for division of matrimonial property upon divorce and /or dissolution of the marriage. The instant application seeks injunctive relief to preserve the matrimonial properties until completion of the divorce proceedings and onset of division of the said properties if found to be matrimonial properties and each party's contribution to acquiring the same.

The Applicant annexed copy of registration of Companies certificate that shows the directors of [**particulars withheld**] **Management Limited** are both the Applicant and Respondent; man and wife. The Company holds 2 bedroom apartments (11) and 1 bedroom apartments (5)

Although the said Company is a separate legal entity and not party to these proceedings; The Company acts through its directors who are parties in this matter and hence the Company by lifting the corporate veil are the 2 parties. To that extent the application can and may be heard on its merits after compliance with **Section 7 of Matrimonial Property Act; 2013**.

There is a competent application before Court and the Court has requisite jurisdiction to hear and determine the application to preserve the suit properties *In reliance of Section 7 of Matrimonial Property Act 2013*

The Notice of Motion dated 31st January, 2018 does not seek division of matrimonial property at this stage but preservation of the subject-matter completion and outcome of the divorce proceedings by the Magistrates Court and thereafter the determination of the suit properties as matrimonial property or not and if /what constitutes direct /indirect contribution to the acquisition and development of the suit properties by the Family Division of the High Court.

Section 17 of the Matrimonial Property Act 2013 grants a party right to file an application before division of matrimonial property proceedings

and provides:

(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.

DISPOSITION.

1. The Preliminary Objection is hereby dismissed.

2. The application Notice of Motion of 1st February 2018 be set down for and determination before any Court within Family Division.

3. The parties should update the court on the status of the Divorce Cause No. 56 of 2017.

4. Each party to bear own costs.

DELIVERED,SIGNED & DATED IN OPEN COURT ON 5TH FEBRUARY 2019.

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

.....for the Plaintiff

.....for the Defendant

Court Clerk - Jasmine