



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

MATRIMONIAL CAUSE NO 2 OF 2017

TNM.....APPLICANT

- V E R S U S -

BMK.....RESPONDENT

RULING

This ruling relates to the Notice of Motion dated and filed in court on 13/6/2018 by **SWM** and **SWM2** (the applicants). It is brought under Articles 48, 50(1) of the Constitution 2010, Order 1 Rule 10(2) and 22 of the Civil Procedure Rules, Section 3A Civil Procedure Act.

The application seeks an order that **SWM** and **SWM2**, being interested parties herein, be allowed to join these proceedings and be awarded the costs of the application.

The plaintiff **TNM** was represented by **Mr. Gatonye of Mirugi Kariuki Advocates** while the applicants are represented by **Mr. Nzioki of Nzioki Muthini Advocates**.

SW, the 1st applicant in her affidavit dated 8/6/2018 deponed that there are allegations made against her in the Originating Summons dated 27/4/2016 and the issues for determination therein directly affect the ownership of her share in Nyandarua/Passenga/** that was allocated to her by the defendant who is her husband; that the decision of the court will affect her and if not allowed to join these proceedings, she stands to suffer prejudice.

SW2 the 2nd applicant also a wife of the defendant reiterated the contents of S's affidavit. Both **SW** and **SW2** filed a joint supplementary affidavit dated 23/7/2018 in which they deponed that the subject matter in the originating summons is matrimonial property; that they are wives to the defendant and the fact that they are mentioned in the proceedings gives them a right to reply. They deny that the suit property was acquired before they married the defendant and that they have greatly contributed to it.

In his submissions, **Mr. Nzioki** identified two issues for determination, the first being, who is an interested party and whether the applicants are entitled to be joined to the proceedings as Interested Parties.

Counsel relied on **Black's Law Dictionary 9th Edition and Order 41 Rule 5 Civil Procedure Rules** on the definition of who an Interested Party is. In the decision of **Yusuf Ahmed Farah and 3 others HCC.100/2016 (Milimani Commercial) (2016) e KLR** the court defined an Interested Party as "**A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation.**" He further relied on the decision of **Trusted Society of Human Rights Alliance v Mumo Matemo and 5 others Petition 12/2013 (2014) e KLR** where the court said that an Interested Party is a person that will be affected by the decision of the court if the proceedings continue without him.

Counsel urged that each of the applicants has already been allocated 9¼ acres of the subject land and they have been mentioned in the Originating Summons and therefore the matter can only be determined if they are on board.

The application was opposed through the grounds of opposition filed in court on 9/7/2018, the submissions filed in court on 9/7/2018 and 27/9/2018. The plaintiff contends that the applicants have not brought forth any evidence that they are necessary parties in this matter; that there is no evidence to show that the applicants will aid in the effective and conclusive determination of the matter; that the applicants have not demonstrated that they have a claim in the suit property; that the suit property was acquired long before the applicants' marriage to the defendant; that the mere mention of their names in the Originating Summons does not entitle them to be enjoined; that the applicants had been aware of the filing of this suit and their application is meant to digress from the real issues, hence is vexatious and meant to delay the hearing and determination of the matter.

Mr. Gatonye agreed with the applicants on the definition given to an Interested Party in terms of Order 1 Rule 10(2) CPR and Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. **Mr. Gatonye** argued that the Interested Party must prove that the presence of an Interested Party in the proceedings is necessary to effectively adjudicate the matter or that

they are necessary parties. Counsel relied on the decision in Werrot & Co. Ltd and others v Andrew Douglas Gregory & another HCC.2363/1998 where Ringera J. as he then was held “**For determining the question who is a necessary party; there are two tests;**

(1) There must be a right to some relief against such party in respect of the matter involved in the proceedings in question and;

(2) It should not be possible to pass an effective decision in the absence of such a party.”

Counsel submitted that the Interested Party have not demonstrated that they have a right to the suit property; that the matrimonial property vests in spouses in terms of Section 7 of the Matrimonial Properties Act 2013 and that they have not shown any relief that they will be entitled to.

Counsel further submitted that under Section 17(1) of the Matrimonial Properties Act, the contest must be between husband and wife and that the applicants have not substantiated their allegations as required by Section 107 of the Evidence Act; that the applicants have not rebutted the presumption under Section 8(1) of the Matrimonial Properties Act to the effect that property acquired by a man and the first wife shall be retained by that man and wife only; the applicants have not shown that they were married to the defendant by 1964.

I have considered the application, all the affidavits on record and submissions by counsel.

The main issue in the Originating Summons filed by the Plaintiff is whether Nyandarua/Pessenga/** was acquired during the marriage between the plaintiff and defendant and whether it should be shared between the plaintiff and defendant or retained by either of them.

The plaintiff does not deny that the two applicants are the wives of the defendant.

So who is an Interested Party?

Black’s Law Dictionary 9th Edition Page 1232 defines an Interested Party as “**A party who has a recognizable stake (and therefore standing) in a matter.**” It further defines who a necessary party as “**A party who being closely connected to a law suit should be included in the case if feasible, but whose absence will not require dismissal of proceedings.**” (page 1298).

In the case of Trusted Society of Human Rights Alliance, the Supreme Court defined an Interested Party as:

“An Interested Party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”

Order 1 Rule 10(2) of the Civil Procedure Rules gives the court a wide discretion to join a party necessary to a suit. Order 1 Rule 10(3) reads:

“(2) the court may at any stage of the proceedings, either upon or without application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as a plaintiff or defendant be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit, be added.”

Section 107(1) of the Evidence Act espouses the principle that he who alleges must prove. It is therefore the duty of the applicants to prove on a balance of probabilities that they have a right to some relief in this matter and that their presence in the matter is necessary for the court to effectively and completely adjudicate on the matter.

The Originating Summons is brought pursuant to the provisions of the MP Act No.49 of 2013 which provides for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes.

The Originating Summons is brought pursuant to Section 17 of the MP Act which provides as follows:

“Section 17(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.”

The plaintiff claims that the suit property was acquired in 1964 during her marriage to the defendant which is long before the applicants got married to the defendant and that she single handedly developed it.

Section 8(1)(a) MP Act provides that:

“Matrimonial Property acquired by the man and the first wife, shall be retained equally by the man and the first wife only, if the property was acquired before the man married another wife.”

As earlier noted, it seems not to be disputed that the plaintiff was the first wife of the defendant and that the applicants came into the relationship later. The question is when did the applicants get married to the defendant? In my view, the issue of when the applicants got

married to the defendant is very material to determining whether either of them may have any interest in the said property.

The issue of when the applicants got married to the defendant cannot await the hearing of the main suit, yet the applicants totally avoided to state when they got married to the defendant. The applicants had the duty to demonstrate that by the time the suit property was acquired, they were married to the defendant and therefore have an interest in it in accordance with Section 8(1)(a) of the MP Act.

It is not enough for the applicants to generally allege that they are married to the defendant and have contributed to the development of that land or that part of the suit property has been allocated to them.

I do agree with the plaintiff's submission that the applicants' interests in the property if any, are pegged on the interests of the defendant and it is the defendant who will articulate and protect their interests if necessary.

In the end, I find that the applicants are not necessary parties to this cause and their application to be joined to these proceedings as IPs is not merited and is hereby disallowed. The applicants will bear the costs of the application.

Dated, Signed and Delivered at NYAHURURU this 7th day of March, 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Gakui Chege holding brief for Mr. Karanja for defendant/respondent

Mr. Ojoo holding brief for Mr. Getanda for applicant

Soi – Court assistant