



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

HIGH COURT CIVIL SUIT NO.70 OF 2018 (OS)

IN THE MATTER OF AN APPLICATION FOR DIVISION

OF MATRIMONIAL PROPERTY BY UMARU FOFANA

UNDER SECTION 17 OF THE MATRIMONIAL PROPERTY ACT NO. 49 OF 2013

UF.....PETITIONER

VERSUS

LCN.....RESPONDENT

RULING

1. The Respondent in this case, LCN filed a Notice of Preliminary Objection dated 10.6.2019 to the Originating Summons filed herein on 14.12.2018 on the following grounds;

i. THAT the Petitioner lacks capacity to file the Petition before this Court as there is no marriage subsisting and/or between the Respondent and the Petitioner herein.

ii. THAT this Court lacks the jurisdiction to entertain and/or grant the prayers sought by the Petitioner under the Matrimonial Properties Act.

2. The Parties were directed to file Submissions which I have duly considered. The Respondent in the Notice of Preliminary Objection submitted as follows;

i. THAT the Petitioner has not brought evidence of his marriage to the Respondent or its dissolution.

ii. THAT the Petitioner has attached two copies of Certificates of Title document showing LCN as owner of LR No. [Particulars withheld] and FLETCHER M. LUDEKI is the owner of [Particulars withheld] and further that this Court lacks jurisdiction to issue declaration of right and severing of Property that belongs to the Respondent and to property belonging to a third party namely FLETCHER M. LUDEKI.

iii. THAT the provisions of the Matrimonial Property Act under which the Originating Summons is filed namely Section 17 provides for declaration of rights to any property but the Petitioner is seeking to be granted all the property owned by the Respondents and he is also seeking the proceeds of sale of the aid property.

iv. The Respondent further submitted that since there is no marriage between the parties, the Court with jurisdiction is the Environment and Land Court but not the Family Court where the case has been filed.

3. The Petitioner opposed these submissions and also submitted as follows;

i. THAT the Preliminary Objection is misplaced as the assertions raised by the Respondent do not constitute a pure point of law to warrant raising a Notice of Preliminary Objection.

ii. THAT the celebrated decision of MUKISA BISCUIT MANUFACTURING CO. LTD [1969] EA 696 settled the standard to be satisfied as follows:

“a Preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts are to be ascertained or if what is sought is the exercise of judicial discretion”

iii. THAT Preliminary Objection factual issues disguised as points of law and the court will require to call evidence from the parties to ascertain the issues raised.

4. I find that the Preliminary Objection will require ventilation of issues such as whether or not the properties stated in the Originating Summons were acquired by the parties during the Subsistence of their marriage. I find that the Court will have to establish whether the parties were married and whether the properties were acquired during the pendency of the said marriage.

5. Section 17 of the Matrimonial Property Act provides as follows;

Action for declaration of rights to property

(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.

6. The Petitioner is seeking declaratory orders and such declaratory orders may be granted notwithstanding that the marriage has not been dissolved. Section 17 of the Matrimonial Property Act under which the originating summons is filed does not deal with division of property.

7. This Court has jurisdiction under Section 17 of the Matrimonial Property Act to declare that the suit properties are Matrimonial Property and to preserve the same if there is evidence that the said properties were acquired during the subsistence of the marriage.

8. The party alleging marriage must prove the existence of the alleged marriage and also that the said properties were acquired by the parties during the subsistence of the said marriage.

9. However, the said property can only be distributed in accordance with Section 7 of Matrimonial Property if the parties are divorced or if the marriage is dissolved.

10. Section 7 of Matrimonial Property Act provides as follows;

Ownership of matrimonial property

Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

11. The Court with the Jurisdiction to hear Divorce causes in the Magistrate’s Court since the enactment of the Marriage Act 2014.

12. 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.”

13. In the current case, I find that the Court can only preserve the properties pending divorce proceedings by the parties if it is established that they are matrimonial properties. See the case of M.M.M. v W.N. K. (2019)Eklr where the court stated that It had jurisdiction to determine and preserve suit properties.

14. I accordingly find that the preliminary objection lacks in Merit as it amounts to a technicality.

15. Article 159 (2) (d) mandates the Court to resolve disputes without undue regard to technicalities of Procedure. I accordingly dismiss the

Preliminary objection dated 10.6.2019 and I direct that the originating summons be heard by way of viva voce evidence.

16. The hearing of this case will be on 26th July 2019 during which date the witnesses will adopt their statements and be cross examined on the same to enable this Court expedite the hearing.

17. The costs of the Preliminary Objection will abide the cause.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 12TH DAY OF JULY, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.