



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 20 OF 2018

MKO.....APPELLANT

=VRS=

AMOM.....RESPONDENT

{Being an appeal against the Ruling of Hon. B. M. Kimtai - SRM Keroka dated and delivered on the 16th day of October 2018 in the original Keroka Principal Magistrate’s Court Divorce No. 2 of 2018}

JUDGMENT

By a petition dated 24th May 2018 filed in the Keroka Resident Magistrates Court on even date the appellant in this case petitioned for dissolution of the marriage between her and the respondent. In addition to the prayer for dissolution the petitioner also sought orders to restrain the respondent from ejecting her from the matrimonial home and disposing other properties she alleged were acquired during the marriage. The petitioner also made a prayer maintenance and for partition of the property. Contemporaneously with the petition she filed a Notice of Motion seeking the following orders: -

“(a) THAT this Honourable Court be pleased to issue a temporary injunction/order restraining the Respondent whether by agents, servants, invitees from molesting, harassing, intimidating, threatening, provoking, annoying, trailing, inciting or otherwise interfering with the Applicant’s/Petitioner’s peaceful habitation and living in her current matrimonial home situated on Land Reference Number Manga Settlement Scheme/xxxx within Keroka Township pending hearing and determination of the Petition herein.

(b) THAT this Honourable Court be pleased to issue an order to the Officer Commanding Manga Police Station to enforce prayers/orders 2 and 3 (read (a)) above upon being granted by this honourable court.

(c) THAT this Honourable Court be pleased to issue an order directing the Respondent to provide monthly maintenance of Kshs. 1,000,000/= to the Petitioner/Applicant pending hearing and determination of the Petition herein.

(d) THAT this Honourable Court be pleased to issue an Order pending the hearing and determination of the petition herein directing that the proceeds of the family income emanating from the following businesses: -

(a) KISII MUNICIPALITY BLOCK xxxx

(b) KISII MUNICIPALITY BLOCK xxxx

(c) KISII MUNICIPALITY BLOCK xxxx

(d) KISII MUNICIPALITY BLOCK xxxx

(e) KISII MUNICIPALITY BLOCK xxxx

be deposited in a joint account between the Applicant/Petitioner and the Respondent.”

When the application went before the trial court for hearing, the respondent raised a preliminary objection firstly on the jurisdiction of the lower court to hear the application and secondly on the ground that an application for partition of matrimonial property could not be entertained before dissolution of a marriage. The court heard and considered submissions of the Advocates for the parties and upheld the objection. This appeal is against the ruling of the trial Magistrate’s finding that he did not have jurisdiction to hear the application as well as the order for dismissal.

This appeal was canvassed by way of written submissions. I have considered those submissions and the authorities cited by learned Counsel and I am in agreement with Counsel for the appellant that the trial Magistrate acted in error. The law relating to marriage and divorce was consolidated in the year 2014 and all marriages and their dissolution are now governed by **The Marriage Act 2014**. The Act defines court as **a resident magistrates court established under section 3 of The Magistrates Courts Act**. The resident magistrate as defined in the **Magistrates Courts Act** includes **a court presided over by a Principal Magistrate**. The Marriage Act does not allude to pecuniary jurisdiction or the nature of the marriage but what is clear is that the lower court is now the trial court for all marriages and their dissolution. Division of matrimonial property on the other hand is governed by the **Matrimonial Property Act** whose date of commencement was 16th January 2014 and the **Matrimonial Causes Act**. **Section 17(1) of the Matrimonial Property Act** makes provision for jurisdiction and procedure in actions for declaration of rights to property and states:

“(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.”

Unlike the **Marriage Act**, **Section 17(1)** of the **Matrimonial Property Act** has no definition of the word court and uses the article “a” meaning a party may file in whichever court. From a reading of that section the respondent’s arguments that declarations such as those sought by the appellant may be made only after dissolution of marriage are not correct. **Subsection (b)** provides that **the application may be made as part of a petition in a matrimonial cause and subsection (c) clearly stipulates that such an application may be made notwithstanding that a petition has not been filed relating to matrimonial causes.**

The trial Magistrate also misconceived the law on the petitioner’s prayer for maintenance pending hearing of the petition. Such claims are recognized by the law and are provided for under **Section 25 (1)** of the **Matrimonial Causes Act** together with **Rule 38** of the rules thereof. **Section 25 (1) of the Matrimonial Causes Act** and **Rule 38 of the Matrimonial Causes Act** states: -

“25. Alimony *pendente lite*, alimony and maintenance

(1) In any suit under this Act, the wife may apply to the court for alimony pending the suit, and the court may thereupon make such order as it may deem just: Provided that alimony pending the suit shall in no case exceed one-fifth of the husband’s average net income for the three years next preceding the date of the order, and shall continue in the case of a decree nisi of dissolution of marriage or of nullity of marriage until the decree is made absolute.

Rule 38. Alimony pending suit

A wife petitioner who has not included in her petition a prayer for alimony pending suit may make an application for alimony pending suit at any time after filing the petition, and a respondent wife or a respondent husband against whom a petition for divorce or judicial separation is presented on the ground of his insanity may make an application for alimony pending suit at any time after entering appearance to a petition.”

Clearly the trial Magistrate is seized of jurisdiction to hear and determine the application. Accordingly, this appeal is allowed, the order dismissing the notice of motion is set aside and the file is remitted to the trial court to hear and determine the application on its merits. The costs of this appeal shall abide the cause in the lower court. It is so ordered.

Signed, dated and delivered in Nyamira this 7th day of November 2019.

E. N. MAINA

JUDGE