



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CIVIL SUIT NO. 71 OF 2015 (OS)

In the Matter of an Application under the Matrimonial Property Act, 2013

-BETWEEN-

F K BAPPLICANT

AND

J B R.....RESPONDENT

RULING

Partial ruling

[1] This court delivered a partial ruling on this matter as follows:-

[1] I have been invited to determine the following Respondent's objections contained in the Notice of Preliminary Objection filed on 10th November 2015 to wit;

- 1. The court has no jurisdiction to determine the rights or interest of the parties herein respecting the alleged matrimonial property, during the subsistence of the marriage.*
- 2. The action is frivolous, scandalous, vexatious and an epitome of abuse of the due process of this honourable court.*

[2] Before I could determine the Preliminary Objection, I note the following important matter. By consent of parties, on 18th of May 2017, suit number MERU CMCC NO 213 OF 2015 between the Respondent and the Applicant herein was transferred and consolidated with this cause. It was also part of the consent that both cases shall be heard together. The court is yet to receive the original file thereto. In the circumstances, therefore, the court is not in a position to determine the objection raised in the absence of the original file, namely, MERU CMCC NO 213 OF 2015. Accordingly, therefore, I direct the Deputy Registrar to forward file number CMCCC NO 213 OF 2015 to this court with all convenient speed. Upon receipt of the file, I shall deliver ruling on the Preliminary Objection questioning the jurisdiction of this court. It is so ordered.

Dated, signed and delivered in open court at Meru this 19th day of December, 2017

[2] Following the partial ruling above, file number CMCCC NO 213 OF 2015 was delivered to the court.

The two are now consolidated and form single proceeding.

[3] I now turn to the objection raised. By an Originating Summons dated 17th August 2015 and expressed to be brought pursuant to Section 14 (a) of the Matrimonial Property Act 2013 and Order 37 Rule 1 of the Civil Procedure Rules CAP 21 of the laws of Kenya, the Applicant has sought the following orders:

1. THAT LR NO. NTIMA/IGOKI/[Particulars withheld] being immovable property developed and improved during the period of coverture is wholly owned by the Applicant and three children of the marriage namely; E K, K M and B G who are registered as joint owners.

2. THAT LR NO. NTIMA/IGOKI/[Particulars withheld] being immovable property which is undeveloped during the period of coverture is wholly owned by the Applicant and the children of the marriage namely E K, K M and B G who are registered as joint owners.

3. THAT the Honourable court be pleased in the meantime to restrain the Respondent from selling, charging, parting with possession save to the plaintiff, disposing off, alienating, charging, collecting any rent from tenants residing on LR NO. Ntima/Igoki/[Particulars withheld] and LR NO. NTIMA/IGOKI/[Particulars withheld] or in any manner dealing with the said immovable properties in a manner prejudicial to the Applicants right and interest in the said properties pending the hearing and determination of this suit.

4. THAT the rental money be remitted to the children's account for their education and education related expenses.

5. THAT the Respondent is not entitled to any portion of the said parcels

6. THAT the Respondent pays the costs.

[3] In MERU CMCC NO 213 OF 2015 filed by the Respondent against the Applicant, the orders sought therein relate to a declaration of trust on LR NO NTIMA/IGOKI/[Particulars withheld] as family property, and that the Respondent herein be included in the registration of these lands. He also sought for protection orders of the matrimonial properties.

[4] Now I have been invited by Carl Peters, the advocate for Respondent, to determine the following Respondent's objections contained in the Notice of Preliminary Objection filed on 10th November 2015 to wit;

1. The court has no jurisdiction to determine the rights or interest of the parties herein respecting the alleged matrimonial property, during the subsistence of the marriage.

2. The action is frivolous, scandalous, vexatious and an epitome of abuse of the due process of this honourable court.

Legal threshold on preliminary objection

[5] I need not re-invent the wheel. 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.”

[6] The objection taken out is that this court is devoid of jurisdiction to hear this case. Her I must admit

that the sweetest canticle to ever be composed on jurisdiction was by Nyarangi JA in the case of **OWNERS OF THE MOTOR VESSEL “LILLIAN S” vs. CALTEX OIL (KENYA) LTD [1989] KLR 1** 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.”

[7] This is the test I shall apply. According to the Respondent; (1) the suit lands are matrimonial property; (2) the parties are husband and wife since they are yet to be divorced; (3) the properties were registered during the subsistence of the marriage; and (4) the Applicant is essentially seeking enforcement of her perceived rights in matrimonial property. The Respondent relied *inter alia* on the case of **P.W.M VE.M (2014) eKLR** where the Court of Appeal opined thus;

“We find and hold that the learned judge had no jurisdiction to alienate suit lands between spouses during their lifetime or unbroken coverture and he ought to have dismissed the suit.”

[8] But, Mr. Wamwayi, legal counsel for the Applicant submitted that case number MERU CMCC NO 213 of 2015 has been transferred to this court, consolidated and shall be heard with this cause. And that the central theme running in both suits now consolidated, is declaration of trust and beneficial interest of the parties in the properties in issue. According to Mr. Wamwayi, the court has jurisdiction to make such declarations as a way of protecting matrimonial property, thus, giving effect to the rights in article 45(3) of the Constitution.

[9] Upon consideration of all factors, there is one thing to which none of the parties attached any importance; the Divorce cause No NBI CMC DIV CASE NO 198 OF 2014. The court has not been told about the current status of the divorce proceedings. Even from the pleadings, the court is not able to ascertain the current status of the divorce proceedings. I am only able to discern from the pleadings that these parties are not living together- and I do not know whether that has changed or not. This fact changes the entire corpus of things. In addition, although in these two suits, one spouse is seeking *inter alia*, exclusion or inclusion of the other spouse from or into ownership of the suit properties, they also seek for protection orders of the matrimonial properties. In light of all these things, you cannot ignore the probative value of the arguments by Mr. Wamwayi that declarations aimed at protecting the matrimonial properties are necessary so as to give effect to rights in article 45(3) of the Constitution. In any event, in both cases parties have applied for orders of protection of the matrimonial properties. I do not think there is any prohibition in law that a spouse cannot seek orders of protection of rights in or matrimonial properties during the subsistence of marriage. In the new dispensation, spousal consent in intrusive transactions relating to the matrimonial property is a legal requirement, thus, a spouse may file legal proceedings against the other spouse who may attempt to dissipate or deal with matrimonial property in a manner that violates the law. In fact, there will be need to probe evidence in order to determine the objection. As such, any objection which requires probing of evidence or copious explanations as in this case, is not a true preliminary objection. Similarly, any objection which cannot dispose of the entire suit is not a true preliminary objection. This is the case here. I note also that the properties are registered in the joint names of the Applicant and other persons. Therefore, in such mix of matters as in these two but consolidated suits, it is only feasible that they should be dealt with in plenary trial of the suits rather than within the restricted scope of preliminary objection. Accordingly, the objection herein fails and is dismissed. Nonetheless, parties should update this court on the status of the divorce case.

Dated, signed and delivered in open court at Meru this 1st day of February, 2018

F. GIKONYO

JUDGE

In the presence of:

M/s. Kiome for Wamwayi for applicant

M/s. Njenga for Carlpeters for Respondent

F. GIKONYO

JUDGE