



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MATRIMONIAL CAUSE NO. 1 OF 2018

IN THE MATTER OF CONSTITUTION OF KENYA, 2010 (CHAPTER 4 ART 45(3))

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN PROPERTY ACT

IN THE MATTER OF SECTION 7 OF THE MATRIMONIAL PROPERTY ACT, 2013

AND

IN THE MATTER OF SECTION 3(1) OF THE JUDICATURE ACT CAP. 8 LAWS OF KENYA

BETWEEN

F M.....PLAINTIFF/APPLICANT

VERSUS

E M M.....DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant has filed an originating summons dated 14/2/2018 seeking the following prayers namely:

(1) That a declaration do issue that all property situate at Katangi Market along Machakos Kitui Road being a plot measuring 50 by 100 and another measuring half (1/4) an acre, sold to us by one Kioko Kombo, was acquired by the joint funds and efforts of the Applicant and Respondent during the subsistence of their marriage and all registered in the name of or in the possession of the Respondent are owned jointly by the Applicant and the Respondent.

(2) THAT a declaration do issue that all the property situate at Kanyongonyo which borders Kalamu on the South and Waki on the left, Maloza on the right measuring approximately 400 acres, sold to us by one MuluMutisya and whose title is yet to be processed, was acquired by efforts of the Applicant and Respondent during the subsistence of their marriage and all documents registered in the name of or in the possession of the Respondent are owned jointly by the Applicant and the Respondent.

(3) THAT a declaration do issue that all property situate at Kanyangi measuring approximately 100 acres was acquired by the joint funds and efforts of the Applicant and Respondent during subsistence of their marriage and all documents registered in the name of or in the possession of the Respondent are owned jointly by the Applicant and the Respondent.

*(4) THAT a declaration do issue that all property situate at **MLOLONGO PHASE 3 BEING PLOTS NUMBER [particulars withheld]** with all buildings and developments thereon were acquired by the joint funds and efforts of the Applicant and Respondent during the subsistence of their marriage and all documents registered in the name of or in the possession of the Respondent solely or jointly with third parties are owned jointly by the Applicant and the Respondent.*

*(5) THAT a declaration do issue that all that property known as **MACHAKOS/KATANGI PLOT NOS. [particulars withheld]** sold to us by one Maingi Mulinge with all buildings and developments thereon were acquired by the joint funds and efforts of the Applicant and Respondent during the subsistence of their marriage and all documents registered in the name of or in the possession of the Respondent solely or jointly with third parties or held as security are owned jointly by the Applicant and the Respondent.*

(6) THAT a declaration do issue that all property known as **KINYATTA/IKOMBE “B”/ [particulars withheld]** which was the applicants and Respondents’ matrimonial home, together with all building and developments thereon was acquired by the joint funds and efforts of the Applicant and Respondent during the subsistence of their marriage and registered in the name of or in the possession of the Respondent solely is owned jointly by the Applicant and the Respondent.

(7) THAT a declaration do issue that all property known as **MACHAKOS/KATANGI/[particulars withheld],MACHAKOS/KATANGI/[particulars withheld],MACHAKOS/KATANGI/[particulars withheld],MACHAKOS/KATANGI/[particulars withheld]**, together with all buildings and developments thereon was acquired by the joint funds and efforts of the Applicant and Respondent during the subsistence of the marriage and registered in the name of or in the possession of the Respondent solely is owned by the Applicant and the Respondent.

(8) THAT a declaration do issue that all property known as **KINYATTA/IKOMBE “A”/ [particulars withheld]**, together with all buildings and developments thereon was acquired by the joint funds and efforts of the Applicant and Respondent during the subsistence of their marriage and registered in the name of or in the possession of the Respondent solely is owned jointly by the Applicant and the Respondent.

(9) THAT a declaration does issue that all property known as **HOUSE STALL NO. [particulars withheld] SITUATED AT KAHAMA WEST MARKET & HOUSE NUMBER W1[particulars withheld] SITUATED AT JERICHO LUMUMBA ESTATE**, together with all buildings and developments thereon was acquired by the joint funds and efforts of the Applicant and Respondent during the subsistence of their marriage and any document registered in the name of or in the possession of the Respondent solely, is owned jointly by the Applicant and the Respondent.

(10) THAT a declaration do issue that all property known as **PLOT NOS. [particulars withheld] ALL SITUATE AT MLOLONGO PHASE II B**, together with all buildings and developments thereon was acquired by the joint funds and efforts of the Applicant and Respondent during the subsistence of their marriage and registered in the name of or in the possession of the Respondent solely, is owned jointly by the Applicant and the Respondent.

(11) THAT a declaration do issue that all that property known as **IKANGA/ITHUMULA/[particulars withheld]** together with all buildings and developments thereon were acquired by the joint funds and efforts of the Applicant and Respondent during the subsistence of their marriage, and registered in the name of or in the possession of the Respondent solely, is owned jointly by the Applicant and the Respondent.

(12) THAT a declaration do issue that all those **SHARES IN EMBAKASI VILLAGE CRAFTS AS WELL AS PLOTS NUMBERS [particulars withheld]**, together with all buildings and developments thereon were acquired by the joint funds and efforts of the Applicant and Respondent during the subsistence of their marriage, and registered in the name of or in the possession of the Respondent solely, are owned jointly by the Applicant and the Respondent.

(13) THAT a declaration do issue that all those motor vehicles identified as **KYP [particulars withheld] PICKUP TOYOTA HILUX, KAA [particulars withheld] R PEUGOT [particulars withheld], KAU [particulars withheld] X TOYOTA PRADO** were acquired by the joint funds and efforts of the applicant and Respondent during the subsistence of their marriage and registered in the name of or in the possession of the Respondent solely, but are owned jointly by the Applicant and the Respondent.

(14) THAT a declaration do issue that all equipments identified as **POLAR PAPER GILLOTINE, BOBST DIE CUTTING MACHINE, HEIDEL BEIRG SORKZ 2 COLOUR PRINTING MACHINES, GO A SIZE PRINTING MACHINE, KORD A2 SIZE PRINIGN MACHINE, A4 GESTERTNER [particulars withheld] PRINTING MACHINE, LAMINATING MAHCINE & PERFECT BINDER (BOOK GLUING MACHINE)** as well as **TRACTOR KTCA [particulars withheld]** were acquired by the joint funds and efforts of the Applicant and Respondent during the subsistence of their marriage and registered in the name of or in the possession of the Respondent solely, but are owned jointly by the Applicant and the Respondent.

(15) THAT a declaration be made that the Respondent holds the said properties and shares in trust for the Applicant.

(16) THAT the properties be settled for the benefit of the Applicant in such manner and proportions as this honourable court deems fit and just.

(17) THAT the respondent himself, his agents and or servants employees be restrained form alienating encumbering or in any manner whatsoever disposing and or dealing with the said properties in whatsoever manner to the detriment of the Applicant.

(18) THAT the Respondent be condemned to pay the costs of this summons and other incidentals thereto.

2. The Applicant’s Application is supported by the annexed affidavit of the Applicant sworn on even date and further on the following grounds namely:

(a) That the Applicant and Respondent herein have been customarily married vide Kamba customary Law since the year 1986.

(b) That due to irreconcilable differences the Applicant and Respondent separated sometimes in the month of December, 2017.

(c) That the properties above mentioned were acquired by joint efforts of both the Applicant and the Respondent during the subsistence of their marriage.

(d) That the Respondent has not provided anything for the Applicant who is now wallowing in poverty despite having contributed financially and through other non monetary means like management of the matrimonial home, companionship, management of family business as well as farm work.

(e) That the respondent has already began disposing off the said properties, shares livestock and motor vehicles in a bid to defeat the court of justice.

3. The Defendant/Respondent through his learned counsel filed a Notice of Preliminary Objection dated 5/4/2018 which raised the following grounds: -

(1) THAT the orders sought in the application cannot be granted in law as the alleged marriage under Customary Law between the Applicant and respondent is contested and does not lie.

(2) THAT there are no rights of the Plaintiff that has been breached in law to warrant the orders sought.

(3) THAT the application as drawn and filed is incurably defective in law and should be struck out in totality.

(4) THAT the Honourable court lacks jurisdictions to entertain the cause under Section 7 of the Matrimonial Property Act 2013.

(5) The entire suit is bad in law and an abuse of the court process.

4. The Defendant/Respondent subsequently filed a replying affidavit sworn on 20/04/2018 in which he raised the following grounds of objections:-

(a) That not all the properties listed by the Applicant are registered in his names and which belong to other parties not joined in this claim.

(b) That vehicle registration numbers KYP [particulars withheld], KAA [particulars withheld] and KAV [particulars withheld] are not in his names.

(c) That the rest of the properties if found to be registered in his names are held in trust of his father's businesses which he runs on his behalf.

(d) That the Defendant challenges the existence of a marriage between him and the Plaintiff.

(e) That the Applicant has failed to establish the ownership of the alleged properties as no official searches have been availed.

(f) That the jurisdiction of this court is contested.

5. Learned counsels made oral submissions on the preliminary objection.

The Defendant's Case

It was submitted for the Defendant that the annexures to the supporting affidavit have not been commissioned and further some of them do not have translations in the language of the court. It was further submitted that there was no proof of ownership of the listed properties by way of searches. It was also the defence contention that the plaintiff has not availed proof of marriage as provided for by the Matrimonial Property Act 2014. The Defendant finally contended that this court lacks jurisdiction to determine the matter and hence the suit should be struck out for being defective.

The Plaintiff's Case

It was the plaintiff's case that she had been married to the defendant and during the marriage they acquired several properties to which she now stakes a claim onto. The plaintiff contends that the action of the defendant in disposing and wasting the properties will occasion her great loss and prejudice. It was submitted for the plaintiff that the Defendant's preliminary objection is not in conformity with the holding in the case of **Mukisa Biscuit Manufacturing Co. Ltd -VS- West End Distributors Co. Ltd [1969] EA 696** since matters of facts are being raised. It was finally submitted for the plaintiff that the lack of commissioning of exhibits is an issue of technicality which this court should excuse in line with the provisions of Article 159 (2) of the Constitution. The plaintiff sought reliance in the case of **Milkah Munciah Munoko -VS- Lawrence O. Oduma, Nairobi Matrimonial Cause No. 6 of 2016**.

6. Determination:

I have considered the preliminary objection lodged by the Defendant and the submissions of the learned counsels for the parties. The issue I raise for determination herein is whether the preliminary objection should be upheld. Indeed a party to a suit is entitled to raise a preliminary objection on point of law at any stage of the proceedings and if the same is allowed then it could help to dispose the matter without the need

for a hearing. A preliminary objection has been defined in the classions case of **MUKISA BISCUIT MANUFACTURING CO. LTD =VS= WEST END DISTRIBUTORS CO. LTD [1969]** where it was held 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 where any fact has to be ascertained or what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and occasion same confusion of issues. This improper practice should stop”.

The preliminary objection raised by the Defendant has raised issues to do with lack of proof of marriage, that some of the properties identified by the Plaintiff’s might not belong to the Defendant. It is noted that the Defendant in his replying affidavit has deponed inter alia that some of the properties listed by the Plaintiff are not registered in his names and likewise the motor vehicles disclosed. That if any of the properties are found to be registered in his names then the same are being held in trust for the Defendant’s father one **P M M**, that the Defendant challenges the existence of a marriage between him and the plaintiff, that in view of the defendant’s dispute as to the existence of a marriage this court lacks jurisdiction to entertain the matter. It is therefore apparent that the preliminary objection aforesaid appears to raise matters of fact which require a trial in the matter. Indeed the Defendant himself has alluded to the fact that some of the properties do not belong to him and that in the event that evidence will be availed indicating that he owns some of them then he shall be adducing evidence to the effect that such properties are held in trust for his father. Hence these issues clearly cloud the preliminary objection allegedly raised on points of law to the extent that the said preliminary objection does not meet the threshold as enunciated in the **Mukisa Biscuit Manufacturing Co. Ltd =Vs= West End Distributors Co. Ltd (supra)**. The preliminary objection in my view does not raise pure points of law and as such there is need to have this matter go to full trial so that all the rival issues of fact are properly thrashed out.

Even though the learned counsel for the Defendant has submitted that the originating summons filed by the Plaintiff is defective and ought to be struck out and further that this court lacks jurisdiction, I am not persuaded by the same for the reason that the Matrimonial Property Act does not provide for the mode of institution of proceedings. If a party desires to come by way of originating summons pursuant to order 37 of the Civil Procedure Rules then that will be in order since an originating summons is one of the modes of instituting a suit before the courts. In any event the courts are under a duty to ensure that every litigant has access to justice as provided for under Article 48 and 50 of the Constitution of Kenya 2010. Further any shortcomings to do with procedural technicalities are excusable under Article 159 (2) (d) of the Constitution which requires that cases be handled on merits.

The present suit appears to involve parties where it is claimed that they were once married and it would not be fair to shut out either of them from litigating their case before this court. I find there is no prejudice suffered by the Defendant if the matter is ordered to go to trial on the merits so that each one of them shall have their day in court. I find the preliminary objection raised herein is meant to prevent the Plaintiff from presenting her dispute before this court.

7. In the result it is the finding of this court that the preliminary objection dated 5th April, 2018 lacks merit. The same is rejected. Each party to bear their own costs.

Orders accordingly.

Dated and delivered at MACHAKOS this 12th day of June, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Kilonzo for Mrs Mutua - for the Plaintiff/Applicant

No appearance for Opiyo - for the Defendant/Respondent

Josephine - Court Assistant