



IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 7 OF 2016 (OS)

IN THE MATTER OF SECTION 17 OF THE MATRIMONIAL PROPERTY ACT, 2013

BETWEEN

EMM ALIAS EMG.....PLAINTIFF/APPLICANT

AND

GWM ALIAS GWM.....DEFENDANT/RESPONDENT

JUDGMENT

FACTS

1. The Originating Summons is dated the 19th April, 2016 and the applicant seeks for the determination of the following questions;
 - (i) Whether the Honorable Court should make a declaration that the judgment issued by The District Court of County of Hennepin State of Minnesota USA in Case No. 27-FA-14-1893 is enforceable in Kenya;
 - (ii) Spent
 - (iii) Whether the Honourable Court should authorize its Deputy Registrar to execute all transfer documents for TITLE NOS. [Particulars Withheld] on behalf of GWM alias GWM should she decline to execute the same;
 - (iv) The Land Registrars in Nyeri and Kajiado Land Registries should be directed to dispense with the production of the copies of the PIN Identity card and passport size photographs of GWM alias GWM while registering the properties listed in the decree and (iii) above should she decline to supply the said documents;
 - (v) Who should pay costs of the summons;
2. The Applicant relied on the Supporting Affidavit made on the 19th April, 2016; hereunder is a summary of the applicant's submissions;
 - (i) The marriage between the applicant and the respondent was celebrated on the 1/06/1993 at Karatina within Nyeri County; both subsequently migrated to the United States of America and settled in the state of Minnesota; the marriage irretrievably broke down and the applicant petitioned for divorce in 2014 vide Court File No.27-FA-14-1893 in the District Court of the County of Hennepin; judgment was recorded on 15/08/2014; the certified copy of the judgment was annexed as 'EMM1';
 - (ii) The judgment decreed that all the real estate in Kenya be awarded to the applicant; the applicant and the respondent owned property in Kenya some jointly and some individually; the properties are as listed hereunder;
 - (a) NYERI/NAROMORU/[Particulars Withheld] in the name of GWM
 - (b) NYERI/NAROMORU/[Particulars Withheld] in the name of GWM
 - (c) IRIANI/GATUNDU/[Particulars Withheld] in the names of EMG and GWM
 - (d) RUGURU/KARUTHI/[Particulars Withheld]in the names of EM G and GWM

(e) KONYU/BARICHO/[Particulars Withheld] in the names of EMG and GWM

(f) KONYU/BARICHO/[Particulars Withheld] in the names of EMG and GWM

(g) KJD/OLCHORO-NYORE/[Particulars Withheld] in the names of EMG and GWM

3. The Official Search Certificates for all the above-mentioned properties were annexed and marked as **EMM.2(a)–(g)**;

4. That the respondent may decline to execute the transfer documents in favour of the applicant; hence the prayer for the Deputy Registrar of this court to be authorized to execute the documents on the respondent's behalf;

5. The respondent might also decline to provide the completion documents namely the Original Title documents, copy of her PIN Certificate, copy of her Identity Card and passport size photographs; and therefore the Land Registrars in Nyeri and Kajiado to dispense with the production of the documents;

6. The respondent though served with summons by way of substituted service as ordered by the court chose not to respond; those were the orders prayed for by the applicant together with costs;

ISSUES FOR DETERMINATION

7. Taking into consideration the above submissions this court has framed the following issues;

8. Whether the Honorable Court should make a declaration that the judgment issued by the District Court of County of Hennepin State of Minnesota USA in Case No. 27-FA-14-1893 is enforceable in Kenya;

9. Whether the Honourable Court should authorize its Deputy Registrar to execute all transfer documents for TITLE NOS. [Particulars Withheld] on behalf of GWM alias GWM should she decline to execute the same;

10. Whether the Land Registrars in Nyeri and Kajiado Land Registries should be directed to dispense with the production of the copies of the PIN Identity card and passport size photographs of GWM alias GWM while registering the properties listed in the decree and (iii) above should she decline to supply the said documents;

11. Who should pay costs of the summons;

ANALYSIS

Whether the Honorable Court should make a declaration that the judgment issued by The District Court of County of Hennepin State of Minnesota USA in Case No. 27-FA-14-1893 is enforceable in Kenya:

12. It is well noted that the applicant had filed a similar application which was dismissed by the Hon. Justice Ngaah as being misconceived as the applicant had sought to register and to execute the foreign judgment purporting that it was from a reciprocal country, yet it was not;

13. Reference is made to the Foreign Judgment (Reciprocal Enforcement) Act particularly Section 13 the Act; this Act enables this country to commit its judicial process in assisting to enforce judgments from another judicial system of a country that shares a reciprocation on enforcement of judgments; the designated countries are Australia, Malawi, Seychelles, Tanzania, Uganda, The United Kingdom and the Republic of Rwanda;

14. The United States of America was found not to be one of the countries listed in the Schedule of the Act; that applicant was unable to enforce his judgment;

15. Instead of being stranded with an unenforceable judgment the applicant proceeded to file his claim by way of Originating Summons under the provisions of Section 17 of the Matrimonial Property Act seeking for the same orders for the registration and enforcement of a foreign judgment issued by The District Court of Hennepin State of Minnesota, USA;

16. Section 17 of the Act reads as follows;

17. 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.

17. One of the procedures provided by the Act is by way of Originating Summons and such procedure can only be adopted in determination of clear simple and straight forward issues; the matters raised by the applicant relate to enforcement of a foreign judgment awarded to him over several immoveable properties registered in Kenya either in the respondents name or in their joint names; as there is a judgment already in place the issues over his rights to the properties are found to be straightforward and are neither serious nor complex in nature requiring that it be canvassed by way of a plaint; refer to the case of **Wakf Commissioners vs Mohammed [1984] KLR 346** where the Court of Appeal held that;

“Where complex issues are raised and disputed in an application made by way of originating summons the court should dismiss the summons and leave the parties to pursue their claims by way of ordinary suit”.

17. The application is thus found to be properly before this court;

18. The application is supported by an affidavit made by the applicant EMM alias EMG; which states that he is the holder of a judgment and order of the District Court Hennepin State of Minnesota, USA; and annexed to the affidavit is a certified copy of the order of that court;

19. The respondent was served by way of substituted service by courier at her last known address and also an advert was placed in a local daily; It is noted that the applicant proceeded to apply for interlocutory judgment which was rejected as there was no proof of service; he then proceeded to fix the matter for hearing and on the date fixed for hearing the respondent had not filed any response nor did she make any appearance to challenge and controvert the averments made by the applicant in his affidavit; the matter proceeded ex-parte;

20. From the evidence presented by the applicant the parties celebrated their marriage in Karatina on the 1st June, 1993; and then they both migrated to Minnesota in the United States of America; the marriage broke down irretrievably culminating in the applicant petitioning for divorce in the year 2014; **the District Court of the County of Hennepin Minnesota in the United States in its judgment** decreed that all the real estate in Kenya be awarded to the applicant;

21. From the annexed certified copy of the judgment it is clear that the court must have established that there was cohabitation and that the properties constituted matrimonial property and thus proceeded to award all the properties listed therein to the applicant;

22. This court has also had the occasion to peruse the Certificates of Official Searches for all the subject properties and has noted that the registrations were effected between the years 2004 and 2012; this court is thus satisfied that the properties were acquired during the subsistence of the marriage;

23. This court reiterates that currently there is no known provision in our country's Laws for the reciprocal arrangement for the registration and execution of any decree made by the courts in the United States of America and this court is therefore unable and disinclined to grant the order for registration and enforcement as prayed;

24. Considering the facts and the circumstances of this case this court shall invoke the provisions of Article 159(2)(d) of the Constitution which enjoins this court to do substantial justice to the applicant who has come before the court by ensuring that he is not left stranded with an unenforceable decree; therefore in the interest of justice and given the determination of the District Court of the County of Hennepin and in the absence of any evidence of an appeal overturning the same the only obvious and logical determination this court can make in this instance is that the applicant has proved to the desired threshold that there was cohabitation and has also established that the properties are matrimonial property within the meaning of Section 2 of the Matrimonial Property Act and are thus available and liable for distribution;

25. This court makes a determination that the applicant is entitled to a declaration of the whole ownership of the immoveable properties registered either in the names of the respondent or in their joint names of the applicant and the respondent and particularly specified in the Originating Summons and by virtue of the annexed judgment decreed by the District Court of the County of Hennepin Minnesota, United States of America;

Whether the Honorable Court should authorize its Deputy Registrar to execute all transfer documents: Whether the Land Registrars in Nyeri and Kajiado Land Registries should be directed to dispense with the production of the completion documents;

26. In the light of the above declarations this court will not be labour itself in addressing this issue at length as the declarations in itself are justifiable reasons and is satisfied that this is a suitable case for the granting of this order; and direct the Deputy Registrar to execute all the requisite Transfer Documents to effect the transfer of the properties in favour of the applicant; and the respective Land Registrars to dispense with the production of the requisite completion documents;

FINDINGS & DETERMINATION

27. For the forgoing reasons the application is hereby allowed in the following terms;

28. A declaration be and is hereby issued that TITLE NOS. [Particulars Withheld] are hereby declared to be matrimonial property;

29. A declaration be and is hereby issued that the applicant having been married to the respondent is entitled to full ownership and to wholly benefit from the matrimonial properties listed hereinabove;

30. The Deputy Registrar is hereby authorized to execute all transfer documents for TITLE NOS. [Particulars Withheld] on behalf of GWM

alias GWM should she decline to execute the same;

31. The Land Registrars in Nyeri and Kajiado Land Registries are hereby directed to dispense with the production of the copies of the PIN, Identity Card and passport size photographs of GWM alias GWM while registering the properties listed hereinabove should she decline to supply the said documents;

32. To bring closure to the matter the applicant shall bear his own costs.

33. The applicant is at liberty to apply for further orders.

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 15th day of November, 2018.

HON.A. MSHILA

JUDGE